TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]78

GERTRUDE M. REED, ADMINISTRATRIX OF THE ESTATE OF LEO C. REED, DECEASED, PETITIONER,

vs.

DIRECTOR-GENERAL OF RAILROADS, UNITED STATES RAILROAD ADMINISTRATION, OPERATING PHILADELPHIA & READING RAILROAD.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

PETITION FOR CERTIORARI FILED JUNE 9, 1920.

CERTIORARI AND RETURN FILED OCTOBER 23, 1920.

(27,744)

( )

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. .

GERTRUDE M. REED, ADMINISTRATRIX OF THE ESTATE OF LEO C. REED, DECEASED, PETITIONER,

vs.

DIRECTOR-GENERAL OF RAILROADS, UNITED STATES RAILROAD ADMINISTRATION, OPERATING PHILADELPHIA & READING RAILROAD.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Proceedings in the court of common pleas of Philadelphia County	1	1
Docket entries	1	1
Praecipe for summons in trespass	2	2
Summons	3	2
Appearance for defendant	4	3
Statement of claim	5	3
Affidavit of defense	8	5
Stipulation amending record	10	6
Plaintiff's bill of costs	11	7
Defendant's motion and reasons for new trial	12	8
Defendant's motion for judgment n. o. v	17	11
Remittitur	19	12

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 17, 1920.

	Original.	Print.
Testimony of Mary Reed	24	15
Edward L. Delp	28	17
William W. Hipple	37	22
Lawrence L. Stevens	46	28
Edward L. Delp (recalled)	53	32
Fred G. Paul	63	38
Charge of the court	66	40
Certiorari from supreme court to common pleas court	80	47
Proceedings in the supreme court of Pennsylvania	81	49
Appeal and affidavit	81	49
Assignments of error	82	50
Opinion	84	52
Petition for reargument	88	54
Exhibit A—Opinion	93	56
Petition to stay mandate pending application to U. S. Supreme Court	98	59
Order retaining record	101	60
Petition for reconsideration	102	61
Exhibit A—Opinion by Justice Day in Ry. Co. *vs.* Ward	104	62
Order of court dismissing petition	110	64
Docket entries	111	65
Certificate of prothonotary	112	66
Certificate of chief justice	113	66
Writ of certiorari and return		68

1 C. P. No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Adm. of the Estate of Leo C. Reed, Dec'd,

vs.

PHILA. & READING RAILWAY CO.

Docket Entries.

J. J. McDevitt, Jr.

2226.

W. C. Mason. 7/15/1918.

Nov. 13, 1919. Pl'ff's bill, $22.25 filed.

July 16, 1918. Statement & notice to file Affdt. of defense filed.

July 29, 1918. Aff'dt. of defense filed.

July 29, 1919. Stipulation of Counsel filed substituting as Deft. Wm. G. McAdoo, Director General of Railroads.

Nov. 24, 1919. Notes of Testimony fld.

Dec. 2, 1919. By writing filed Pltf. remits all of verdict in excess of $15,000.00.

Summs. Trespass.

Exit June 28, 1918.

Ret. 2 Mon. July, 1918.

Served July 6, 1918.

Nov. 7, 1919. Jury called.

Nov. 10, 1919. Verdict for Pltff. for $19,000.00.

Nov. 14, 1919. Motion for New Trial.

Eo Die. Reasons filed.

Nov. 28, 1919. Rule discharged upon Pltff. filing a remittitur for all of the Verdict over $15,000.00 in 30 days otherwise rule absolute.

Nov. 14, 1919. Deft.'s motion for Judgment N. O. V.

Nov. 28, 1919. Motion refused. Exceptions for Deft.

Dec. 2, 1919. Jury fee paid. Eo Die Judgment.

Dec. 22, 1919. Certiorari from Supreme Court of Jan. T., 1920, No. 203 &c., brought into office.

Certified from the record this 10th day of January, A. D. 1920.
[SEAL.] R. M. SNYDER,
Pro Prothy.

2 C. P., No. 1, June Term, 1918.

No. —.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased,

vs.

PHILADELPHIA & READING RAILWAY COMPANY, a Corporation.

To the Prothonotary:

Issue summons in trespass in the above entitled case, returnable the 2 Monday of July, A. D. 1918.

JOHN J. McDEVITT, JR.,
Attorney pro Plaintiff.

Endorsement: No. 2226, — Term, 1918. C. P. No. —. Gertrude M. Reed, administratrix of the estate of Leo C. Reed, deceased, vs. Philadelphia & Reading Railway Company, a corporation. Praecipe: Summons in trespass. Filed June 28, 1919. (Mark) Pro Proth'y. John J. McDevitt, Jr., Attorney pro Plaintiff.

3 The Commonwealth of Pennsylvania, to the Sheriff of the County of Philadelphia, Greeting:

We command you that you summon Philadelphia & Reading Railway Company, a Corporation, late of your County, so that it be and appear before our Judges, at Philadelphia at our Court of Common Pleas, No. 1, of the County of Philadelphia, to be holden at Philadelphia, in and for the said County, on the 2 Monday of July next, there to answer Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, deceased, of a plea of Trespass, and to have you then and there this Writ.

Witness the Honorable F. Amedee Bregy, President of our said Court, at Philadelphia, the 28 day of June, in the year of our Lord, one thousand nine hundred and eighteen (1918).

[SEAL.] HENRY F. WALTON,
Prothonotary.
By SOLOMON RAINS.

Endorsement: 2226. June Term, 1918. Court of Common Pleas, No. 1. Gertrude M. Reed, Admx. &c., vs. Philadelphia & Reading Railway Co., a corp. Summons, Trespass. McDevitt, Jr.

No. 170. Served Philadelphia and Reading Railway Company, a Corporation, the within named defendant Company, a Corporation, by handing personally July 6, 1918, a true and attested copy of the within writ to George Zeigler, the Secretary of the said defendant

Company, a corporation, at No. 12th and Market Streets in the County of Philadelphia, State of Pennsylvania.

So answers,

GEORGE H. RAHN,
Deputy Sheriff.
HARRY C. RANSLEY,
Sheriff.

4 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of Estate of Leo C. Reed, Dec'd,

vs.

PHILADELPHIA & READING RAILWAY COMPANY.

Enter my appearance for defendant.

WM. CLARKE MASON,
Attorney for Defendant.

To Proth'y of said Court.

Endorsement: No. 2226, June Term, 1918, C. P. No. 1. Gertrude M. Reed, Admx. vs. Railway Co. Appearance. Filed Jul. 15, 1919. ——— ———, Pro Prothy. Wm. Clarke Mason, Attorney for Defendant.

5 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased,

vs.

PHILADELPHIA & READING RAILWAY COMPANY, a Corporation.

Statement of Claim.

1.

The plaintiff, Gertrude M. Reed, administratrix of the Estate of Leo C. Reed, deceased, claims of the defendant, Philadelphia & Reading Railway Company, a corporation, the sum of $30,000, upon a cause of action whereof the following is a statement:

2.

The plaintiff's deceased husband, Leo C. Reed, on or about the 23rd day of February, A. D. 1918, at or about 8 A. M., was employed by the defendant company at or about Bethlehem yard in the State of Pennsylvania.

3.

While thus employed, the defendant company was engaged in interstate commerce.

4.

While so engaged and employed and at the time of the fatal injuries sustained, decedent was engaged in interstate commerce.

5.

While engaged as aforesaid, as a result and in consequence of the negligence of the defendant's agent or servant a certain locomotive, or cars, was so carelessly and negligently operated that the same was caused and permitted to come in violent contact with a caboose occupied by the decedent, that the decedent sustained the fatal injuries before mentioned.

6 6.

The defendant's agent or servant causing the fatal injuries to the plaintiff's deceased husband was careless and negligent in that he allowed and permitted the said locomotive, or cars, to run down and strike the said caboose occupied by the decedent; failed and neglected to maintain proper control over the said locomotive, or cars, and such control as the circumstances and surrounding conditions required; he caused the said caboose to become derailed thereby inflicting upon the plaintiff's deceased husband the fatal injuries complained of.

7.

In consequence of the aforesaid negligence, the plaintiff in her capacity as aforesaid has otherwise been deprived of the help, aid, assistance, support, maintenance and companionship of her deceased husband and otherwise damaged.

8.

The deceased left surviving him, in addition to the plaintiff, a minor child, Wilbur C. Reed, four years of age.

9.

The plaintiff claims $30,000.

JOHN J. McDEVITT, Jr.,
Attorney pro Plaintiff.

7 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Gertrude M. Reed, being duly sworn according to law, deposes and says that she is the plaintiff in the foregoing statement and that

the facts set forth in said statement as the basis of claim are true and correct.

GERTRUDE M. REED.

Sworn to and subscribed before me this 5th day of March, A. D. 1918.

JULIA M. O'BRIEN,
[SEAL.] *Notary Public.*

Commission expires Jan. 28, 1921.

Endorsement. No. 2226. June Term, 1918. C. P. No. 1. Gertrude M. Reed, administratrix of the Estate of Leo C. Reed, deceased, vs. Philadelphia & Reading Railway Company, a corporation. Statement of Claim and Rule to File Affidavit of defence. To The Within Defendant, You are required to file an Affidavit of Defence to this Statement of Claim within fifteen days from the service hereof, John J. McDevitt, Jr., Attorneys for Plaintiff. Filed Jul. 16, 1918. Black, Pro Prothy. Jury Trial Demanded. John J. McDevitt, Jr. John J. McDevitt, Jr., 811 Pennsylvania Bldg., Atty. pro Plaintiff.

8 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of Estate of Leo C. Reed, Dec'd,

vs.

PHILADELPHIA & READING RAILWAY CO.

Affidavit of Defence.

Answering the averments contained in the Plaintiff's statement of claim, the Defendant above named admits that it is properly described therein.

The Defendant denies the allegations of negligence; and denies that it is liable to the Plaintiff in the sum set forth in the Plaintiff's declaration or for any other sum whatsoever.

The above named defendant, the Philadelphia & Reading Railway Company, denies, however, that at the time the alleged cause of action arose the said Railway Company was in possession of and engaged in the operation of the cars and engines involved in the said accident, or employed and controlled the persons operating the same; but on the contrary avers that the said cars and engines were under the control and management of the United States of America, and that the employees engaged in operating the same were employed by and under the control of the United States of America. The defendant denies that the decedent Leo C. Reed was employed by it, the Philadelphia & Reading Railway Company, but on the contrary avers that he was employed by the United States of America.

This affidavit is filed subject to the rights of the United States of America reserved in the Acts of Congress and the Proclamations of the President in such cases made and provided.

WM. CLARKE MASON,
Counsel for Defendant.

9 Endorsement: No. 2226, June Term, 1918. C. P. No. 1. Gertrude M. Reed, Admx. Estate of Leo C. Reed, dec'd, vs. Philadelphia & Reading Railway Co. Affidavit of Defence. Filed Jul. 29, 1918. Blair, Pro Proth'y. Wm. Clarke Mason, Attorney at Law, 614-617 Franklin Building, Philadelphia, Pa.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

George Ziegler being duly sworn according to law deposes and says: that he is the Secretary of the defendant company within named: and that the facts set forth in the foregoing affidavit of defence are true to the best of his knowledge, information and belief.

GEORGE ZIEGLER.
W. M. S.

Sworn to and subscribed before me this 23rd day of July, A. D. 1918.

[SEAL.] J. V. HARE,
Notary Public.

Commission expires March 1, 1919.

10 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of Estate of Leo C. Reed, Dec'd,

vs.

PHILADELPHIA & READING RAILWAY CO.

Stipulation.

Pursuant to General Order No. 50 of the United States Railroad Administration and the Proclamations of the President of the United States, it is hereby agreed that the name of the above defendant, Philadelphia & Reading Railway Company, shall be stricken from the Precipe, Summons and all of the pleadings thereafter filed in the above entitled proceedings, and that in lieu thereof and in substitution therefor as the proper defendant in the above entitled cause of action there shall be inserted the name of "William G. McAdoo, Director General of Railroads."

That the said cause of action shall proceed as though originally brought against "William G. McAdoo, Director General of Rail-

roads," and that any and all objections heretofore made by the defendant with reference to the proper identity of the defendant are hereby withdrawn.

JOHN J. McDEVITT, JR.,
Counsel for Plaintiff.
WM. CLARKE MASON,
Counsel for Defendant.

Endorsement: No. 2226, June term, 1918. C. P., No. 1. Gertrude M. Reed, Administratrix, &c., vs. Philadelphia & Reading Railway Co. Stipulation of Counsel Amending Record. Filed May 5, 1919. Madde, Pro Proth'y. Wm. Clarke Mason, Attorney at Law, 614-617 Franklin Building, Philadelphia, Pa.

11 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Adm. of Estate of Leo C. Reed, Dec'd,

vs.

PHILADELPHIA & READING R'W'Y CO.

Plaintiff's Bill of Costs.

Gertrude M. Reed, the above named plaintiff, claims in addition to such others as are payable to her according to law, the following costs in the above case for attendance of witnesses in Common Pleas No. 1, Room "A," on November 3rd, 4th, 5th, 6th, 7th, and 10th, 1919, to wit:

Edward Delk, 6 days, $1.50	$9.00
Henry J. Sweeney, 6 " 1.50	9.00
Lawrence Stevans, 1 " 1.50	1.50
For serving subpœna on each of foregoing witnesses	2.00
Subpœna	.25
Affidavit hereto	.50
	$22.25

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Gertrude M. Reed, being duly sworn according to law, deposes and says that the above Bill of Costs is correct that the witnesses named were necessary, material and in attendance as above and actually present in Court.

GERTRUDE MAE REED.

Sworn to and subscribed before me this 12th day of November, A. D., 1919.

[SEAL.] ROYAL W. URIE,
Notary Public.

Commission expires March 20, 1921.

Endorsement: No. 2226, June Term, 1918. C. P., No. 1. Gertrude M. Reed, Adm. of Estate of Leo C. Reed, dec'd, vs. Philadelphia & Reading R'w'y Co. Plaintiff's Bill of Costs. John J. McDevitt, Jr., Att'y, pro Plaintiff. 811 Pennsylvania Bldg. Filed Nov. 13, 1919. Naye, Pro Proth'y.

12 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of Estate of Leo C. Reed, Dec'd,

vs.

DIRECTOR GENERAL OF RAILROADS.

Motion and Reasons for New Trial.

And now, November 14, 1919, the defendant Director General of Railroads, by his counsel, Wm. Clarke Mason, Esq., moves the Court to grant a new trial in above entitled case, and as reasons therefor assigns the following:

1. The verdict is against the evidence.

2. The verdict is against the weight of the evidence.

3. The verdict is against the charge of the Court.

4. The verdict is grossly excessive, because the amount of the verdict at the legal rate of interest would produce a sum equivalent to the gross earnings of the decedent per annum and leave the principal undisturbed.

5. The learned trial Judge erred in admitting testimony relating to the annuity tables, as follows (pp. 29-31):

Mr. McDevitt: I offer to prove by this witness, in addition to the expectancy of life, the present value of the possible earnings of the decedent, and the annuity tables showing the present value of fixed amounts of money at various rates of interest.

Mr. Mason: That is objected to, because it contains elements that are not in evidence and are necessary in order for the witness to arrive at his conclusions, and second, because that character of evidence as a basis for the measure of damages under the Federal
13 Employers' Liability Act, is not admissible.

Mr. McDevitt: I offer to prove the Standard Annuity Tables and values, by this witness, as a method to be used by the

jury in computing the present value of any verdict that they may award in this case.

Mr. Mason: The same objection is made, as given to the previous offer.

(Objection over-ruled.)

(Exception allowed defendant.)

Mr. Mason: I make the same objection to all of this character of evidence.

(Objection overruled.)

(Exception allowed.)

By Mr. McDevitt:

Q. What is the present value of $100, payable over a period of the expectancy of the decedent, for 38 years?

A. The present value of $100, a year, payable in weekly portions throughout the year—at the rate of 6%—38 years—$1,527.86.

Q. That is payable in weekly instalments?

A. Weekly instalments, yes, of about $1.92 a week—a little over $1.92, and it is not $1.93.

Now, at 5%, $1,727.81; and at 4% $1,974.52.

6. The learned trial Judge erred in refusing defendant's motion for binding instructions, as follows (pp. 48, 49):

Mr. Mason: The defendant moves for binding instructions for the following reasons:

First, the cause of action set forth in the plaintiff's declaration is not proved, and there is such a substantial variance that there cannot be a recovery under this statement of claim;

14 Second, that there is no proof of any negligence with respect to the happening of the accident, except the negligence of the deceased, who was the front brakeman;

Third, that the risks incident to running over a derail were open and obvious, and were assumed by the decedent;

Fourth, there is no proof that at the time of the accident Reed was engaged in interstate commerce;

Fifth, that there is no proof that at the time of the accident, that the instrumentality which was the cause of the injury, and subsequent death of Reed, to wit, the cars standing on the adjoining track, were engaged in interstate commerce and therefore under the case of Myers vs. Union Railroad, there could be no recovery.

(Motion overruled).

(Exception to defendant).

7. The learned trial Judge erred in charging the jury on the question of interstate commerce, as follows (pp. 63-64):

The Court: Here is what I said:

"First of all, were the deceased, and the crew and the cars engaged in interstate commerce at the time of the accident? Of course we know, as a matter of fact, that at the time of the accident, they were not actually handling interstate commerce freight; but that is not the question. The question is whether or not they were engaged in interstate commerce within the meaning of the Federal Employers' Liability act. The law is this: that if an employee of an interstate railway carrier is doing something necessarily incident to his day's work, and which partakes of the character of that work as a whole, then he is, so far as the Federal Employers' Liability act is concerned, engaged in interstate commerce. The testi-
15 mony is that the deceased was assisting in putting away the caboose and engine which had been used in interstate commerce. I charge you as a matter of law that this would bring the deceased within the Federal Employers' Liability Act."

Mr. Mason: That is what I understand.

The Court: I meant, providing the jury believe the testimony.

Mr. Mason: The testimony is not disputed.

The Court: No, it is not disputed.

Mr. Mason: I say now that so far as the testimony is concerned, it is to be believed. I expect them to believe the testimony. I ask them to do so. Your Honor will give me an exception to that part of your charge?

(Exception allowed).

8. The learned trial Judge erred in failing to charge the jury that because there was no proof that the defendant was engaged in interstate commerce in the use of the car which caused the injury, there can be no recovery.

9. The learned trial Judge erred in charging the jury upon the question of interstate commerce, as follows (p. 54):

"The testimony is that the deceased was assisting in putting away the caboose and engine which had been used in interstate commerce. I charge you as a matter of law that this would bring the deceased within the Federal Employers' Liability act."

10. The learned trial Judge erred in charging the jury on the question of negligence, as follows (p. 57):

16 "If, on the other hand, you find that the engineer of the railroad company was negligent in the manner in which he operated the car, in not obeying signals, or in driving the engine and caboose into what he knew, or should have known under the circumstances, to be a point of danger for the deceased, then your verdict under those circumstances should be for the plaintiff."

11. The learned trial Judge erred in charging the jury on the evidence relating to the present value of money as a basis for a verdict, as follows (pp. 53 and 59):

"This witness also testified that the present value of $100 payable over a period of 38 years, at 6%, is $1.527.86; at 5%, $1.727.81, and at 4%, $1.974.52."

* * * * * * *

"Evidence has also been offered to show the present worth of $100 for 38 years at various rates of interest."

WM. CLARKE MASON,
Counsel for Defendant.

Endorsement: No. 2226, June term, 1918. C. P. No. 1. Gertrude M. Reed, Admx. of Leo C. Reed, dec'd., vs. Director General of Railroads. Defendant's Motion and Reasons for New Trial. Filed Nov. 14, 1919, Browns. Wm. Clarke Mason, Attorney at Law, 614-617 Franklin Building, Philadelphia, Pa.

17 C. P. No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of Estate of Leo C. Reed, Dec'd.,

vs.

DIRECTOR GENERAL OF RAILROADS.

Motion for Judgment, N. O. V.

And now, November 14, 1919, the defendant Director General of Railroads, by his counsel, Wm. Clarke Mason, Esq., moves the Court to have all the evidence taken upon the trial duly certified and filed, so as to become part of the record, and for judgment non obstante veredicto upon the whole record, for the following reasons:

1. Because the record shows that the cause proved is not the cause of action pleaded in the plaintiff's statement of claim, and this variance is a bar to a recovery.

2. Because the evidence produced by the plaintiff fails to show any negligence by any servant of the defendant other than the negligence of the decedent Reed.

3. Because the risks incident to the movement of the train toward the derail were assumed by Reed, and there can be no recovery under the Federal Employers' Liability act.

4. Because the evidence fails to show that at the time of the accident Reed was engaged in interstate commerce, and there can be no recovery under the Federal Employers' Liability act.

5. Because there is no evidence to show that the box car, which caused the injury to the decedent Reed, was being used by the defendant as an instrumentality of interstate commerce, and therefore there is no evidence to show that the defendant was engaged in interstate commerce at the time of the accident.

6. Because the finding by the jury, under the charge of the learned trial Judge, that the death of the decedent Reed was due to the negligence of the defendant while the defendant was engaged in interstate commerce and the decedent Reed was employed in interstate commerce, is a finding without any evidence to support it, and a judgment entered upon such verdict would be in violation of the rights of the defendant secured by the XIVth Amendment of the Constitution of the United States of America.

18 7. Because the learned trial Judge refused to charge the jury as requested by defendant, to wit: "Under all the evidence in this case your verdict must be for the defendant."

WM. CLARKE MASON,
Counsel for the Defendant.

Endorsement: No. 2226. June term, 1918. C. P. No. 1. Gertrude M. Reed, Admrx. of Leo C. Reed, dec'd vs. Director General of Railroads. Defendant's Motion for Judgment Non Obstante Veredicto. Filed Nov. 1, 1919. Browns. Wm. Clarke Mason, Attorney at Law, 614-617 Franklin Building, Philadelphia, Pa.

19 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased,

vs.

DIRECTOR GENERAL OF RAILROADS.

Remittitur.

And now, to wit, this 1st day of December, A. D. 1919, the plaintiff in the above case remits so much of the verdict in excess of the sum of Fifteen Thousand Dollars ($15,000).

GERTRUDE M. REED,
Plaintiff.
JOHN J. McDEVITT, JR.,
Attorney pro Plaintiff.

Endorsement: No. 2226. June term, 1918. C. P. No. 1. Gertrude M. Reed, Administratrix of the estate of Leo C. Reed, deceased,

vs. Director General of Railroads. Remittitur. John J. McDevitt, Jr., Atty. pro plaintiff, 811 Pennsylvania Bldg. Filed Dec. 2, 1919.

20 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased,

vs.

DIRECTOR GENERAL OF RAILROADS.

Dec. 2/19. 15,000.00

Prothonotary C. P.:

Enter judgment on the verdict in the above case, and I hereby certify that the precise residence address of the Judgment creditor is 1931 E. Firth Street, Phila.

Filed Dec. 2, 1919. R. Richardson, Pro Prothy.

JOHN J. McDEVITT, JR.,
Attorney.

John J. McDevitt, Jr., 809 Penna. Bldg.

21 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased,

v.

DIRECTOR GENERAL OF RAILROADS.

Philadelphia, November 7th, 1919.

Index.

	D. Ex.	C. Ex.
Gertrude May Reed	2	5
Edward L. Delp	6	13
William W. Hipple	17	20

22 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of the Estate of Leo. C. Reed, Deceased,

vs.

DIRECTOR GENERAL OF RAILROADS.

Philadelphia, November 10, 1919.

Second Day.

Index.

	D. E.	C. E.
Lawrence L. Stevens	28	31
Edward L. Delp	36	45
Fred G. Faul	46	47
Charge of the Court		50

23 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of the Estate of Leo. C. Reed, Deceased,

v.

DIRECTOR GENERAL OF RAILROADS.

Philadelphia, November 7th, 1919.

Before PATTERSON, J., and a Jury.

Present:

John J. McDevitt, Jr., Esq., for plaintiff.

William Clarke Mason, Esq., for defendant.

Mr. McDevitt: When this suit was instituted, William G. McAdoo was Director-General of Railroads. Since that time he has been relieved, and the present form or method of trying is against the Director-General of Railroads. Therefore I move to amend the record to comply with the proclamation relating to these cases, so that the jury may be sworn in the case of Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, deceased, v. The Director-General of Railroads.

The Court: That is agreed to?

Mr. Mason: Yes.

24 GERTRUDE MAY REED, plaintiff, sworn.

By Mr. McDevitt:

Q. Where do you live?
A. 1931 E. Firth St.
Q. Where did you live before the death of your husband?
A. 1926 E. Firth.
Q. How old was your husband at the time of his death?
A. 25 years, and three months.
Q. How old are you?
A. 27 this November, the 26th of this November.
Q. What was your husband's full name?
A. Leo Charles Reed.
Q. And you have been appointed administratrix of his estate, letters of administration having been granted to you by the Register of Wills of Philadelphia County?
A. Yes.
Q. How many children have you?
A. One.
Q. What is the child's name?
A. Wilbur Charles Reed.
Q. How old is he?
A. Five years old the 31st of July.
Q. Your husband, you say was 25 years, and six months, at the time of his death?
A. Yes.
Q. Was he in good health?
A. Perfect health.
25 Q. So that we may understand, give some general impression of the decedent—what character of man was he, a large man, small man—give us some description of him?
A. He was almost six feet, and he weighed about 184 pounds.
Q. How long had he been employed by the railroad?
A. He started in January, '17.
Q. Of that same year?
A. 1917.
Q. He had been working there a year and a little over one month, at the time of this accident?
A. Yes.
Q. What was his position with the railroad?
A. He was a brakeman.
Q. And at the time he was injured, was he still occupying the position of brakeman, or some other position?
A. The same position.
Q. What salary was he making at that time?
A. He averaged about 25, or more, a week. His last pay was $72, and something.
Q. For how long?
A. For two weeks.
Q. And out of that salary he gave you how much for your support, and the support of your son?

A. He practically gave me his whole pay.

Q. And then did you return something to him, on which he kept himself?

26 A. Any time he needed any money, he came to me, and I gave it to him.

Q. What did that amount to a week?

A. Some pays he didn't take anything; some pays he took $2, or $3, or $4—whatever he wanted, I gave him.

Q. He had to buy clothing, did he?

A. He took that out of the pay.

Q. You say he was in good health?

A. Yes.

Q. And his salary, you say, averaged from about $25—or about $25 a week.

A. $25, or over.

Q. Have you any way of estimating, or approximating how much he spent a month, or a year, for clothing?

A. Well, I could not give you the right average of that.

Q. After he was injured, you didn't see him again until after his death, did you?

A. No; I saw him before he died.

Q. Where, in South Bethlehem, in the Hospital?

A. South Bethlehem, in the Hospital, St. Luke's Hospital.

Q. Your child is living, and you are supporting the child?

A. Yes.

27 Cross-examined.

By Mr. Mason:

Q. How old did you say you were? 27?

A. 27, the 26th of November.

Mr. Mason: It is agreed that the train of which Leo C. Reed was a brakeman, which left Berks St. yard, Philadelphia, and arrived, on February 23rd, 1918, at Bethlehem, Pa., contained certain cars, which carried interstate commerce.

Mr. McDevitt: The destination of which would be outside of Pennsylvania.

Mr. Mason: The cars in question were T. H. B. 3321, containing fertilizer from Seawall, Md., to Johnson's, N. J.

T. B. 9158, containing fertilizer from Sea Wall, Md., to Norwick, N. J.

C. St. P. Mo. 33266, containing waste paper from Willow and Noble Sts., Philadelphia, to Au Sabel Forks, N. Y.

C. N. J. 9171 was empty from Second and Master Sts., Philadelphia, to be delivered to the Central Railroad of New Jersey.

Mr. McDevitt: Can you tell us, in all, how many cars there were in that train when it reached South Bethlehem?

Mr. Mason: The train contained approximately thirty cars.

Mr. McDevitt: We also ask you to produce the names of the crew. Have you got that?

Mr. Mason: The crew of that train consisted of Engineer Samuel Belmeyer; fireman, Fred. C. Faul; conductor, William W. Hipple; brakeman, Edward Smith; brakeman, Warren Miller; flagman, Leo C. Reed.

28 EDWARD L. DELP, called on behalf of plaintiff, sworn.

By Mr. McDevitt:

Q. You were employed by the Director-General of Railroads on the 23rd of February, 1918?

A. I was.

Q. You were present at the time that Leo C. Reed was killed?

A. I was present at the time he was injured; yes.

Q. Where were you at that time?

A. From 150 to 200 feet in front of him.

Q. And this accident took place in the South Bethlehem yard?

A. It did.

Q. You were not employed on the same train as Reed?

A. No, sir.

Q. On what train were you employed?

A. I was employed on extra 1611—yes, 1611—Conductor Williams.

Q. You knew Reed, did you, before this accident?

A. As a fellow employee; yes.

Q. And you knew the train on which Reed was employed, that morning?

A. I had an idea of it, that is all.

Q. Did you see that train come in on that morning?

A. I did not.

Q. When did you first see that train, or any part of it?

A. I saw nothing but the engine and caboose when the accident happened.

Q. Where was the engine and caboose when you saw them?

29 A. Coming north on No. 1 lumber track, South Bethlehem.

Q. Tell the jury, and the Court in your own way, just what you saw, when you saw the caboose and the engine coming north on what you term No. 1 lumber track, South Bethlehem.

A. I was standing at the crossing watchmen's box, about 150 to 200 feet away from the derail on No. 1 lumber.

The engine that had the accident, was pushing the caboose, and was coming north on No. 1 lumber. Flagman Reed was standing on the lower step, on the right hand side of the caboose, and I heard him hollering. He had his hand out like this, (Indicating) hollering, "Whoa, whoa."

Just about the time that I looked up and seen him—heard him hollering, and seen him standing that way, it struck the derail—the caboose went over the derail into a box car that was standing on the track next to it—what they call No. 2 lumber—and from what I could understand——

Mr. Mason: Don't tell us what you understand. Just tell us what you saw.

A. From what I saw Brakeman Reed got caught between the box car and the caboose, and when the caboose got clear of the box car, he dropped to the ground, and I ran over to him.

By Mr. McDevitt:

Q. You say he was giving a signal. What did that signal mean?

(Objected to.)

Q. You are employed by the railroad in what capacity?

30 A. As a brakeman at the present time, or an extra conductor.

Q. At that time, in what capacity were you employed?

A. As a brakeman.

Q. You are familiar with the signals of that railroad?

A. I was; yes.

Q. Were you familiar with the nature of the signal that Reed was giving as you saw the caboose coming down that track?

A. I was; yes.

Q. What signal was he giving, when you say he was hollering, "Whoa, whoa!"?

A. The signal flagman Reed was giving, is taken for two purposes, among the employees of the railroad. Some take it for a slow-down signal; some take it for a stop signal.

Q. This derail over which the caboose went, had been there how long, to your knowledge?

A. I could not say.

Q. Well, I don't want to hold you to dates—was it months, or years, that it had been there?

A. I don't recollect when the derail was placed there. I knew the derail was there. I don't recollect when it was placed.

Q. Do you know how long before the accident you knew it was there?

A. No; I could not say positively.

Q. How did you know the derail was there?

A. I knew the derail was there, because I had occasion to see it lots of times.

Q. The derail was entirely visible, wasn't it, at the time of the accident?

31 A. Yes.

Q. What time of the day did this accident take place?

A. Around eight o'clock in the morning.

Q. What sort of a derail was it?

A. It sets up on the rail—a piece of iron that sets on the rail.

Q. And its purpose is, as the term implies, to derail a car?

A. To derail a car, or anything else.

Q. For what purpose is the derail placed in that position?

A. To protect the main track.

Q. After this car, or caboose, ran by the freight car, against which

you say it collided, as it was derailed, Reed dropped to the ground, and you ran to him, and you assisted in taking him to the Hospital?

A. Yes.

Q. Was he unconscious?

A. No, sir.

Q. How far did the car run after hitting the derail?

A. You mean how far did the caboose go?

Q. Yes.

A. The whole length of the box car.

Q. How long was that?

A. The ordinary box car runs from 36 feet——

Q. The track on which this caboose was being placed, was how far in from the main track from which they were shifting the caboose to the point of the derail?

A. I don't understand your question.

Q. How far was it from the track from which this caboose had been moved by this engine, to the derail? In other words, this was a side track upon which they were placing this caboose. How far had they run it, into the point where it was derailed?

A. I should judge about four car lengths.

Q. On which side was Reed, the engineer's side, or the brakemen's side of the engine?

A. The engineer's side.

Q. The engine was running in, head first, was it?

A. Yes.

Q. At what rate of speed was this caboose and engine traveling at the time of the derailment?

A. I could not say.

Q. When did they first slacken their speed, before or after the derailment?

A. I didn't take that much notice.

Q. You are still employed by the railroad, aren't you?

A. I am; yes.

Q. Are you the same character of brakeman as Mr. Reed was?

A. In what way?

Q. Are there different classes of brakemen, or just one class, so far as salary is concerned?

A. So far as salary is concerned, we all get the same, for braking.

Q. What salary did brakemen receive at the time Reed was killed?

A. Forty-six and a half cents an hour at that time.

Q. What do they receive now?

(Objected to.)

(Objection sustained.)

Mr. McDevitt: I won't press it.

By Mr. McDevitt:

Q. Are the wages of railroad employees standard—are they standardized, and fixed, on these various railroads?

A. Yes.

Q. Did all brakemen, on the 22nd of February, 1918, receive a certain salary?

A. No; not all did not; no.

Q. What is the distinction then?

A. Because there are two classes of service.

Q. What are the classes of service, passenger and freight?

A. No.

Q. What are they?

A. They is a road rate, and a local rate.

Q. What service was Reed employed in, road work, or local work?

A. Reed got the local rate on that job.

Q. What was the local rate at the time Reed was killed?

A. That I am not positive of.

Q. What is the local rate to-day?

(Objected to.)

(Question withdrawn.)

Cross-examined.

By Mr. Mason:

Q. As I understood it, you were about 200 feet away from where the derail was at the time of the accident?

A. Yes.

Q. And you saw Reed give a signal which some of the employees understand to be a caution signal, and some understand to be a stop signal?

A. Yes.

Q. What is the signal that would be a stop signal, that everybody would understand—how does that differ from the signal that Reed was giving?

A. According to the book of rules?

Q. Yes; what is the stop signal?

A. A direct sign, like that—a horizontal sign.

Q. And the other signal, the way he was giving the signal, indicated caution?

A. Caution, exactly.

Q. You say you heard him call "Whoa," and at the time he called, I understand he was facing toward you, wasn't he?

A. That I would not say.

Q. Had your attention been attracted to it before you heard the cries?

A. My attention was attracted by the calling.

Q. But the whole thing happened so suddenly that you are not able to say in what position he was at the time he called?

A. I can say what position he was in, but I cannot say in what direction he was looking.

Q. My reason for asking the question is this, in order that you may understand my thought; you heard a call. Now the sound might carry in one direction or the other, depending on the way the

man was facing at the time he called, and I am asking you to tell us, if you can, whether Reed was facing towards you or in some other direction, when you heard the call?

A. You want me to tell you positively whether Reed done the calling, or not—is that it?

By the Court:

Q. No; how was he facing, towards you, or away from you?

35 A. I say I cannot say how he was facing.

By Mr. Mason:

Q. Can you tell us positively whether it was Reed?

A. Yes; I am positive that it was Reed.

Q. You heard him call?

A. Yes.

Q. But you cannot tell us which way he was facing at the time?

A. No; I cannot.

Q. I understood you to say to Mr. McDevitt that the derail was entirely visible to you. That is to say, it sets up on the track in such a position that anybody can see it, even 200 feet away, can't they?

A. Yes.

Q. And the engine was pushing the caboose north in your direction at the time of the accident?

A. Yes.

Q. And there was no other car attached to the engine except the caboose, was there?

A. No, sir.

Q. And the derail, as I understand it, is placed on the track in the position that this was at the time, for the purpose of protecting the main line track?

A. That is what they are put there for; yes.

Q. And the adjoining track to this track was a main line track, wasn't it?

A. To the left; yes.

Q. The derail is placed in such a position that when a car strikes it, it will be thrown away from the main line track?

A. Away from the main track; yes.

Q. So that the main line track was on the left as this car was being pushed north, and when it struck the derail it was forced to the right, away from the main line?

36 A. Yes.

By Mr. McDevitt:

Q. You made a distinction—so that we will get this clear—between the way the man was looking, and the way he was standing. Now in other words, you saw Reed, didn't you?

A. I did; yes.

Q. And you heard his voice?

A. Yes.

Q. Now just which way was he facing—not which way was he

looking, but which way was he standing when you heard his voice, and saw him, before the accident?

A. His position was facing to the front.

Q. Facing the direction in which he was going?

A. Yes.

Q. And he was standing on the right hand side of the car then?

A. Yes; on the lower step.

Q. And he was signalling with his right hand, then, or his left?

A. With his right hand.

Q. What was he doing with his left?

A. Holding on to the grab handle.

By Mr. Mason:

Q. The step that you speak of, is a full step, that leads down from the platform of the caboose, isn't it?

A. Yes.

Q. There are three steps there, are there?

A. No.

Q. How many steps there?

A. Two steps, and the platform makes the third one.

37 Q. And it was the lower step he was standing on at the time?

A. Yes.

Q. Could you tell us about how far from the derail the end of the caboose was at the time you first had your attention attracted to it?

A. When I looked up, it was just about on the derail.

By Mr. McDevitt:

Q. Then you heard him before you looked up?

A. Yes.

WILLIAM H. HIPPLE, called on behalf of plaintiff, sworn.

By Mr. McDevitt:

Q. Where do you live?

A. 1915 No. Mascher St., Philadelphia.

Q. You were the conductor on the train on which Reed was employed?

A. Yes.

Q. Where were you at the time of the accident?

A. At the time of the accident, on the rear end of the tank—of the engine.

Q. Which was pushing this caboose?

A. Yes.

Q. From what point had you pushed the caboose?

A. From Third St.

Q. Third St. Philadelphia?

A. 3rd St., crossing, South Bethlehem.

Q. And how far was that from this point of accident?

A. About six car lengths—36 feet cars.

38 Q. And you were putting the caboose in there to store it at the end of your run?

A. No, sir.

Q. For what purpose were you putting it in there?

A. We were not putting it in there, we were just running through that track to get on the main track.

Q. Didn't you know the derail was there?

A. Yes.

Q. Could you get through that track on to the main track?

A. Yes.

Q. Despite the existence of the derail?

A. Well, the derail stops you, if it is on the rail, from getting to the main track, if that is what you are after.

Q. While you were running down there, did you have any conversation with the engineer regarding the derail?

A. Not while we were running down there.

Q. When did you have a conversation?

A. Before we started.

Q. What did you say to him?

A. I instructed him, so far as the movement that was to be made——

Q. The engineer?

A. Yes.

Q. Did you say anything to him about the presence of the derail?

A. Yes.

Q. What did you say to him?

A. I told him to look out for the derail, which might be against them.

Q. You said that to the engineer?

A. Yes.

39 Q. This was a movable derail, was it?

A. Yes.

Q. And what was the nature of the derail? What sort of a derail was it?

A. It was a piece of iron that goes like a hop-toad—it jumps up from the ground on to the rail, and grasps the rail, like that. (Indicating.)

Q. You were the conductor of this train which left Philadelphia on the evening of February 22nd?

A. Yes.

Q. And you had a number of cars, which Mr. Mason has agreed were approximately thirty—which you took to Bethlehem, and then distributed to various points, according to their destination?

A. Yes.

Q. Then after that work was concluded, what did you do? That is, after you had distributed those cars—or had you distributed all of the cars?

A. Yes, I distributed all of the cars at Bethlehem.

Q. Where were you going at the time of the accident?

A. Up through No. 1 lumber, to cross over in the middle of the yard, over the main track, to put the caboose in the yard, on No. 8, and the engine in the round house.

Q. Then your trip was done——
A. Yes.
Q. After you did that?
A. Yes.

Cross-examined.

By Mr. Mason:

Q. Reed was the flagman of this train, wasn't he?
A. Yes.
Q. And you had given him instructions with reference to the movements that you were going to make, at the same time you gave them to the engineer?
A. Yes.
Q. What did you tell him, in reference to these movements?
A. I told him to have four things in mind: the derail; the switch of No. 2 lumber on the crossing; 337's hind end lying at the station; the derail may be against you. We are going up through No. 1 lumber cross-over in the middle of the yard; put the back on No. 8, and the engine at the round house. I looked at Reed, and I said, "There is a special coming in. You better get your red flag, and protect us, as we will obstruct the main track in crossing over in the middle of the yard."
Q. Where did that order require Reed to be in order to protect the main track?
A. South of Third St. crossing, Bethlehem.
Q. With reference to Reed's position on the end of the caboose, in that position what was he to do with reference to the movement of the engine? Was he giving signals? Was he there to give signals?
A. Was he there to give signals?
Q. Yes.
A. He was there to give signals to an approaching train, that may create an accident, running into us, crossing over the yard.
Q. As I understand it, there was no necessity for him to be on the end of that caboose at that time?
A. No; not at that time.
Q. Is there anyone else from whom the engineer can take signals except the man in that position? In moving forward, as this engine was going, with the caboose ahead of it, was it usual or unusual for one of the crew to be on the end of the caboose, to give the engineer signals?
A. No; someone is supposed to be there.
Q. Someone is supposed to be there?
A. Yes.
Q. It is necessary for him to rely on someone who was there, to give him the signals isn't it?
A. Yes; it is.
Q. Because running in that position, with the caboose ahead of him, the engineer cannot see what is on the track, or what is ahead, as I understand. That is correct, isn't it?

A. Yes.

Q. And the man who is on the end of the caboose gives his signals to the engineer to regulate the speed of the train?

A. Yes.

Q. Now you have what is called a caution signal, and a stop signal, haven't you?

A. We have no caution signal; not in the standard rules; no.

Q. You have, however, or you did, on this occasion, have a movement that required you to go from the No. 1 lumber, over on to the—across the main line track?

A. Yes.

Q. And you had told Reed that the derail might be against him?

A. Yes; I told the entire crew that.

Q. So that in going toward the derail it was Reed's duty, wasn't it, to see whether or not that derail was against him, if he assumed that position?

A. It was, in the position he placed himself in, at that time.

42 Q. Now it was also, however, his duty, as flagman, to protect both your engine, and the extra on the main line, from a collision?

A. Yes.

Q. And that latter duty would require him to be out on the main line track?

A. North bound main track.

Q. Were you in a position to see where Reed was, as he was approaching the derail?

A. Yes.

Q. Did you say anything to him, or call to him as he was approaching the derail?

A. I did; yes.

Q. What did you say to him?

A. I called to him to look out for the derail. I hollered "Stop! Look out for the derail." Reed turned around and looked at me. I gave him a motion to get off, and he turned his head around again, still with his hand out like this.

Q. Did he get off?

A. I missed him——

By Mr. McDevitt:

Q. With his hand out straight, you mean, like that?

A. Yes.

By Mr. Mason:

Q. He did not get off?

A. No, sir.

Q. And he was then on the lower step, to the right hand of the caboose?

A. Yes.

Q. Was there anything to interfere with his getting up into the caboose, before he reached the derail?

43 A. No, sir.

Q. Was there anything to interfere with his jumping off before he reached the derail?

A. Yes.

Q. What?

A. There was a box car there. There were two box cars on No. 2 lumber.

Q. They would have interfered with his jumping off?

A. He would have taken a chance, getting off there, of running into the box cars, as the train swung him along.

Q. At the rate you were going, when you saw the derail ahead, and called to Reed to get off, was there time enough for him to cross over, and get off on the other side of the platform?

A. Yes.

Q. After the engine was stopped, about how far beyond the box car did it go?

A. About how far north of the box car?

Q. Yes.

A. About a truck length of the caboose.

Q. That is, the first box car?

A. That is the extreme northern box car. You see there were two there.

Q. And those two cars were standing on which track?

A. No 2 lumber.

Q. And that was the track to the right, as you were going north?

A. Yes.

Q. And the main right track was to the left, as you were going north?

A. Yes.

44 Q. So that the derail was placed in a position which would throw any car approaching it, or striking it, off to the right, away from the main line track?

A. To the right: yes.

Q. That was the purpose of the derail, wasn't it?

A. Yes.

By Mr. McDevitt:

Q. How far was it from the derail to the main track?

A. From the derail to the main track?

Q. Yes.

A. Well, about 36 feet.

Q. And the track to which you refer as the main line track, is that the track on which your train had come up from Philadelphia?

A. Yes.

Q. That track runs between what points—that is, it is a continuation of the line to what point?

A. It is a continuation of the line from Montgomery Ave., Philadelphia, to South Bethlehem station.

Q. Does it terminate at South Bethlehem Station, this main track?

A. Yes.

Q. How fast was the engine going as you ran in on this No. 1 lumber track immediately before the accident?
A. I could not say that.
Q. Approximately how fast was it going?
A. No more than five miles an hour.
Q. And you were standing on the tender?
A. Yes.
Q. And you knew the derail was there?
A. Yes.
45 Q. And as you approached it, you could see it?
A. Well, no; I could not see it.
Q. I mean you saw it when you yelled, "Look out for the derail—stop?"
A. No, sir; I didn't see it then.
Q. You did not?
A. No, sir.
Q. When you yelled "stop," did you yell to the engineer, or yell to Reed?
A. I yelled to the engineer.
Q. And how far was he from the derail at that time?
A. About two car lengths.
Q. And what sort of an engine was this that he was driving or running?
A. What number?
Q. What kind of an engine was it?
A. A superheater engine, I believe.

By Mr. Mason:

Q. I think you told us that when you called to stop, Reed turned around, and you waved to him to get off?
A. Yes.
Q. And he didn't heed it?
A. No, sir, he just turned his head, and looked ahead of him.

By Mr. McDevitt:

Q. And that was after you yelled "stop"?
A. He looked around when I called to stop.
Q. When you yelled?
A. Yes.

Mr. Mason: As I understand it, the plaintiff has closed with reference to the facts that are to be produced, other than the table.
Mr. McDevitt: No, I did not say anything of the sort. I believe I have closed, but I want to call the actuary, and I may call one other witness besides the actuary.
Adjourned to Monday, November 10th, 1919, at 10 a. m.

46 C. P., No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased.

vs.

DIRECTOR GENERAL OF RAILROADS.

Philadelphia, November 10, 1919.

Before Patterson, Jr., and a Jury.

Present:

John J. McDevitt, Jr., Esq., for Plaintiff.
William Clark Mason, Esq., for Defendant.

Second Day.

Mr. Mason: It is admitted that Mr. Leo C. Reed died of the injuries received from the accident described by the witnesses called for the plaintiff.

LAWRENCE L. STEVENS, sworn.

By Mr. McDevitt:

Q. What is your business?
A. Actuary.
Q. Have you the mortality tables with you?
A. Yes.
47 Q. Will you give me the life expectancy of a man 25 years of age?
A. According to the Carlisle Tables?
Q. Yes.
A. 38 years.
Q. What is the present value of $100 per year payable over a period of 38 years?

(Objected to.)

Q. At the interest rate of 6%.

(Objected to.)

Mr. Mason: This question is objected to because it has in it elements which are not evidence and because annuity tables are not proper or legal evidence in support of suits for damage under the Federal Employer's Liability Act.

Mr. McDevitt: This is understood to be put in evidence as to pres-

ent values, or the values of annuities as a basis of proving present values.

Mr. Mason: Yes.

Mr. McDevitt: It is my understanding that the Supreme Court of the United States has held that it is proper, under certain circumstances, to prove the value of annuities, and the present values of a certain or fixed sum of money. It is certainly the established practice under the rules of the courts of this state.

(Objected to.)

Mr. McDevitt: I offer to prove by this witness, in addition to the expectancy of life, the present value of the possible earnings of the decedent, and the annuity tables showing the present
18 value of fixed amount of money at various rates of interest.

Mr. Mason: That is objected to, because it contains elements that are not in evidence and are necessary in order for the witness to arrive at his conclusions; and, second, because that character of evidence as a basis for the measure of damages under the Federal Employer's Liability Act, is not admissible.

Mr. McDevitt: I offer to prove the Standard Annuity Tables and values, by this witness, as a method to be used by the jury in computing the present value of any verdict that they may award in this case.

Mr. Mason: The same objection is made, as given to the previous offer.

(Objection overruled.)
(Exception allowed defendant.)

Mr. Mason: I make the same objection to all of this character of evidence.

(Objection overruled.)
(Exception allowed.)

By Mr. McDevitt:

Q. What is the present value of $100, payable over a period of the expectancy of the decedent, for 38 years?

A. The present value of $100, a year, payable in weekly portions throughout the year—at the rate of 6%—38 years—$1527.86.

Q. That is payable in weekly instalments?
19 A. Weekly instalments, yes, of about $1.92 a week—a little over $1.92, and it is not $1.93.

Now, at 5% $1,727.81; and at 4% $1,974.52.

Cross-examined.

By Mr. Mason:

Q. Taking the Carlisle Tables as a basis for expectancy, some of the jury may not know what the Carlisle Tables mean, and may

never have heard of them. What do you mean by the Carlisle Tables?

A. What do I mean by the Carlisle Tables?

Q. Yes.

A. The Carlisle Tables are tables compiled about 100 years ago.

Q. How long?

A. A little over 100 years ago covering the data which was taken from the death records from the town of Carlisle in England. The data extended from 1789 to 1797. This table is the measure of the mortality rate at each age compiled from those statistics.

Q. Those people are all dead by now, you think?

A. I think so. I would not want to guarantee it.

Q. And as a matter of fact, if you recall the history of the Carlisle Tables, the table was not completed until their death, and then they made their computation?

A. It was computed from the death records, yes.

Q. And you do not use that as a conclusive means of ascertaining how long anybody is going to live, do you?

A. You cannot tell how long any individual is going to *use*; no.

Q. Not even by the Carlisle Tables?

A. No, you cannot tell how long anybody is going to live.
50 You may die today and you may live 100 years.

By Mr. McDevitt:

Q. But that table, in conjunction with the American Mortality Table, is used as the basis upon which all the large insurance companies transact their insurance business?

A. Yes.

Q. In other words, some people will live a less time than the mortality tables will indicate, and others a longer time?

A. It is an indication of the average time people will live at a certain age. Some live a great many more years; some less.

Q. What would have been the expectancy of the decedent under the American Tables?

A. At the age of 25, 39 years.

Q. So your American Mortality Table, which is of newer origin, and more recently compiled than the other tables, would give him a greater expectancy than the Carlisle Tables?

A. One year. That is borne out by the United States Life Table of 1910—the census was taken, and under that the expectation is 40 years. That covers the Eastern States here.

Q. Which table is 40 years?

A. The United States Life Table, including the population of the United States—Rhode Island, Vermont, Pennsylvania, New York, and all around those states, according to the census of 1910.

By Mr. Mason:

Q. When was the American Table computed?

A. The American table—nobody knows exactly—it has
51 been a question among actuaries as to the exact time over

which the data extended, but the table was published in 1868—that is, the American Table.

—. In spite of the fact that all these tables are available the actuary of each one of the insurance companies does his own guessing, and he fixes his own tables for the insurance company, upon which they base their rate?

A. Practically all insurance companies, and I know of no exception in the United States base their calculations for insurance on the American Table, that is the American Table of Mortality—not the newest American Table, but the Table of 1868.

Q. But they do, nevertheless, make their own tables upon which they compute the rate of insurance at certain ages, don't they?

A. No; we have never used any other table except the American.

Q. You represent which company?

A. I don't represent any particular company. I am an actuary agreed upon by the Actuarial Society, after passing the required examinations.

Q. Do you happen to have any experience with the Penn Mutual?

A. Yes, considerable.

Q. Have you had any with the Equitable of New York?

A. Once or twice.

Q. Have you had any with the New York Life?

A. Only indirectly. I have had a couple of interviews with the head actuary.

Q. But are you able to say whether or not from you- own knowledge, the actuaries in the companies I have mentioned do or do not fix their own Mortality tables?

52 A. No, they use the American, because I have gone over all the companies in America and I know all their rates are based on the American Table.

Q. They all have different rates—how do their rates differ so largely?

A. Because they load their net premium for contingencies—expenses and dividends. You will notice the New York Life has larger premium than most companies, but they pay a much larger dividend. That is the idea of insurance, to have a large margin of safety in mutual companies, because they have nothing to fall back upon, as stock companies have. Non-participating companies have much lower rate, but they are all based on the American Table. Some use 3½ and some use 3%.

Q. The actuaries have not varied their mortality table to any degree whatsoever since the American Table began to be used in 1868?

A. No.

Q. Regardless of the fact that automobiles have become a matter of very general use, and electricity has been applied to various kinds of transportation upon the public highways, that aeroplanes have been invented and are in general use—we have had several wars, and still have them—none of those things enter into the Mortality Tabl?

A. We have not changed the American Table since 1900, but there are other tables which have been made since 1868.

Q. You told me that table every actuary used.

A. I say that every insurance company in America uses it to form the basis of their insurance rate.

Q. That is what you told me?

53 A. Yes, that is, to my knowledge.

Q. Well, you made a very broad statement when you said that there are none of them who do not use it.

A. I say to my knowledge—I have gone over the entire list of companies—all the companies I know of—that are published and listed—and they all use the American 3 and $3\frac{1}{2}$% table.

EDWARD L. DELP, recalled.

By Mr. McDevitt:

Q. State whether or not you saw the engine and the caboose after the accident?

A. Yes.

Q. When the engine finally stopped and the accident had occurred, where was the caboose and where was the engine?

A. The caboose and engine were on the ground, off of the rail.

Q. Was the entire engine off?

A. Yes.

Q. And the entire caboose?

A. Yes.

Q. So far as the tank, or tender was concerned, where was it?

A. The leading trucks were off the rail, the hind trucks were on the rail.

Q. I believe you told us it was 36 feet approximately from the derail to the main track?

A. About that, yes.

Q. Those cars, however, which Mr. Hipple described, were thrown off to the right, away from the main track, that is, the caboose and the engine?

54 A. Yes.

Q. You were familiar with this No. 1 lumber—the track on which this accident occurred?

A. Yes.

Q. How long had you been working about there?

A. For the past two years at that time.

Q. Was it a straight track?

A. Yes.

Q. Was there any grade between Third street and the main track?

A. Very slight.

Q. How long have you been a railroader?

A. 11 years.

Q. Are you familiar with the character of engine that was pushing this caboose that was in charge of Bergmier?

A. To the extent of my employment with the P. & R.

Q. And that had extended over how many years?

A. Over two years at that time.

Q. And you had been a railroader for how long, you say?
A. Eleven years.
Q. On that track, and under the conditions that existed at that time, traveling at the rate of speed at which that engine was traveling, within what distance could it have been stopped?

(Objected to.)

Q. Are you familiar with the distance required to stop an engine under those conditions?

(Objected to.)

Q. Are you familiar with the distance within which a locomotive of the type involved in this accident could have been
55 stopped under those conditions, and on those tracks, going at the rate of five miles an hour?

Mr. Mason: That is objected to as totally immaterial.
Mr. McDevitt: It has been testified that the engine was, at the time, going five miles an hour. This witness, or any witness, is qualified to state whether or not he can give an estimate, and then it is a matter of further inquiry as to the basis of his knowledge.
Mr. Mason: The witness can not be made an expert on running engines. This witness is not qualified in any way that would enable him to run an engine of this type or any other, yet.

By the Court:

Q. Did you ever run an engine?
A. Not by authority, no, sir.

By Mr. McDevitt:

Q. You have run an engine?
A. I have run an engine, yes.
Q. You are familiar with the operation of an engine?
A. Yes, to a certain extent.
Q. Are you familiar with the distance that an engine, going at the rate of speed, and under the conditions that existed that morning, could have been stopped?

(Objected to.)

By the Court:

Q. Did you ever stop an engine going at five miles an hour?
56 A. I have, yes.
Q. Did you ever stop a locomotive?
A. I have.
Q. How many times?
A. I cannot say exactly how many times I have stopped them—at various times.

Q. How many is that—various doesn't mean anything to us.
A. Within my career as a railroad man——
Q. How many times?
A. That is a question I could not answer—exactly how many times.

By Mr. McDevitt:

Q. In connection with your work, do you have occasion to ride on the engine?
A. I do, yes.
Q. You are entirely familiar with the operation of engines?
A. I am, yes.
Q. (Question repeated as follows: "Q. Are you familiar with the distance that an engine going at the rate of speed, and under the conditions that existed that morning, could have been stopped?")

(Objected to.)
(Objection sustained.)
(Exception for plaintiff.)

Q. Assuming that this engine was in proper working order, under the conditions that existed that morning, and on those particular tracks, going at the rate of this particular engine, going at
57 the rate of five miles an hour—assuming those to be the facts, could you tell us within what distance it could have been stopped?

(Objected to.)
(Objection sustained.)
(Exception allowed.)

Q. After running down to this derail, under ordinary conditions if he had stopped the caboose because of the existence of the derail what would the flagman do from that point until you got out on the main track?

(Objected to.)

Q. What was it necessary for him to do until you got on to the main track?

(Objected to.)
(Question withdrawn.)

Q. Before this caboose and engine could have reached the main track what was it necessary to do?
A. It was necessary to throw the derail and also the main track switch.
Q. Do you know whether or not train 337 that has been referred to in the testimony was in the station at the time?
A. 337 was standing at the station, yes.

Q. Did that prevent the entry of this caboose and engine on to the main track?

A. Yes.

Mr. Mason: No; the derail did.

By Mr. McDevitt:

Q. Even assuming the derail was out of the way, would that have prevented the entry of this caboose and engine on the main track?

58 A. Yes.

Q. Does the presence of another train occupying the position that was occupied by 337 that morning, have any effect on the switch over from No. 1 lumber on to the main track?

A. The rear end of 337 was standing over the end of the switch, which prevented you from throwing it.

Q. In other words, even if the derail had been opened, this caboose and engine could not have gone on to the main track at that time?

A. Not at that time, no, sir.

By Mr. Mason:

Q. The derail is thoroughly well described by this, isn't it—it is an iron that comes up from the ground—and when it is placed on the track it is placed on the track here (indicating) so that it will derail anything that strikes it, away from the track that it is protecting ?

A. Exactly.

Q. It would not be the same form as this?

A. No.

Q. It would be a form that would throw the moving vehicle to one side or the other, depending on which track was to be protected?

A. Exactly.

By Mr. McDevitt:

Q. Did you notice the conductor Hipple as the engine and tender were going down?

A. No, sir, I didn't see them.

Q. How many places are there on an engine where it can be stopped in an emergency—on an engine of the character involved in this accident?

A. Four places.

59 Q. Where are they?

A. The cock on the pilot of the engine, the cock on the tender of the engine in the rear, and the emergency valve in the cab on the left hand side, and the emergency valve at the apron, where the fireman is, at the fire box.

Q. This emergency valve in the rear of the tender, where was it?

A. It was located right over the air holes, to the right of the drawhead.

Q. In the rear of the tender?

A. In the rear of the tender, yes.

Q. At a point where it could be reached by a man standing on the rear step of the tender?

A. It could be reached by standing on the rear step, yes.

Q. And the use of this emergency valve, that method of stopping the engine, which you say is placed at four places on an engine and tender of this character, would do what?

A. I don't quite get your question.

Q. The use of this valve which you have described as being placed on four different points of the engine and tender, would do what? What effect would it have on the engine?

A. It would stop the engine.

Q. In what way: or how quickly?

A. An engine that was traveling without cars, could be stopped within ten feet.

Q. When you say "without cars," would the caboose have any effect on it?

A. Not in the least.

Q. Has the condensor, under such conditions,—under the
50 rules of the Philadelphia & Reading Railway Company, the right to stop an engine in an emergency?

Mr. Mason: I think the rules themselves ought to be used. I object to that question.

The Court: I think you are right.

By Mr. McDevitt:

Q. Was there any method provided for breaking a train entering a main track, from this No. 1 lumber siding, other than the flagman or attaches of the train, that was entering the main track? Were there powermen or switchmen, or anything of that character?

A. At the south there was a switch, but at the north there was no protection, or a switchman, rather. At the north there is no protection.

Q. How is the north protected?

A. By the flagman.

By Mr. Mason:

Q. By the front man?

A. The front man, the flagman.

By Mr. McDevitt:

Q. What time did it become his duty to go down to protect the north end of that train—the main line train?

A. Under the circumstances I could not answer that question.

Q. What do you mean by "under the circumstances"?

A. I don't know what circumstances that crew was working under—what understanding they were working under.

Q. Was it customary to protect it before or after the switch was down, for the entry from the siding on to the main line?

61 A. Before or after——

Q. Was it customary to protect the north end of the main line before or after the switch was thrown, from the entry of a train from No. 1 lumber, on to the main track?

A. It was never customary to protect it at all.

Q. If it did become necessary to protect it would it be protected before or after the switch was thrown?

A. If it did become necessary, you would protect it before the switch was thrown.

Q. You say that switch could not have been thrown at that time because of the presence of train 337?

A. No, it could not. Not while the train was standing across it.

Q. Do you know—is the engineer of that train Bergmeier, in court?

A. He is, yes.

Q. Is the fireman in court?

A. Yes.

Mr. Mason: I think they are all here.

By Mr. McDevitt:

Q. Are these the set of rules of the defendant, the Philadelphia & Reading Railway Company?

A. They are, yes.

Q. Were those rules in use at the time of this accident?

A. They were, yes.

Cross-examined.

By Mr. Mason:

Q. As I understood you, you told Mr. McDevitt that the extra that was on the main line, was standing in such a way that the rear covered the switch from No. 1 lumber track?

62 A. I didn't say any extra, I said 337.

Q. Well, the train that was due there, was there?

A. Yes.

Q. He asked you then whether it would have been possible for the car on which Reed was riding, to get on to the main track, even though the derail was not there, and you said no. Is that right?

A. I did, yes sir.

Q. And the reason why it would not have been possible at that time was because it would have collided with the other train before it got there?

A. Yes; if it had kept on going.

Q. If it had kept on going, it would have run into the train on the main line track?

A. That is the idea.

Q. Because there is no way in which that engine and caboose

could have gotten across from No. 1 lumber, except to that switch that was covered by 337.

A. Not by going ahead; no.

Q. If it had not gone over the derail was it sufficiently close to have struck the rear of 337?

A. Yes, because those derails are put just in the clear.

By Mr. McDevitt:

Q. One more question, in the conditions existing that morning, from the position occupied by the engineer, could he have seen the derail had he been looking?

(Objected to.)

(Objection sustained.)

(Exception allowed.)

63 FRED G. FAUL, sworn.

By Mr. McDevitt:

Q. Where do you live?

A. 16 South Third Street, Quakertown, Pa.

Q. You were the fireman on the engine of which Mr. Bergmier was the engineer?

A. I was.

Q. Were you on the engine at the time of this accident?

A. Yes.

Q. Which side of the engine were you on?

A. The left hand side.

Q. What sort of an engine was this, what character of engine?

A. A freight engine.

Q. Of what type?

A. I cannot tell what type, I really don't know their class.

Q. How fast were you going at the time of the accident?

A. I do not believe I could estimate the speed.

Q. Had the air brakes been applied at the time of the accident?

A. I could not say.

Q. Did you hear Hipple give any warning to the engineer?

A. I heard him holler.

Q. Was the air brake applied after that?

A. I could not tell you.

Q. Did you know that Reed was on the caboose?

A. No, sir.

Q. You knew someone was on the caboose?

A. I could not tell whether any person was on there or not, not from my position.

64 Q. He was on the engineer's side, rather, wasn't he, on the caboose—the right hand side?

A. He was not on my side, no sir.

Cross-examined.

By Mr. Mason:

Q. You cannot tell whether the air brake was applied or not, is that because the whole thing happened so suddenly, that you don't know what occurred, with reference to motion in stopping? Whether it was the derail or air brake?

A. My mind was not upon that at that moment?

Plaintiff rests.

Evidence closed.

Mr. Mason: The defendant moves for binding instructions for the following reasons:

First, the cause of action set forth in the plaintiff's declaration is not proved, and there is such a substantial variance that there cannot be a recovery under this statement of claim;

Second, that there is no proof of any negligence with respect to the happening of the accident, except the negligence of the deceased, who was the front brakesman;

Third, that the risks incident to running over a derail were open and obvious, and were assumed by the decedent;

Fourth, there is no proof that at the time of the accident Reed was engaged in interstate commerce;

Five, that there is no proof that at the time of the accident, that the instrumentality which was the cause of the injury, and
65 subsequent death of Reed, to wit, the cars standing on the adjoining track, were engaged in interstate commerce and therefore under the case of Myers vs. Union Railroad, there could be no recovery.

(Motion overruled.)

(Exception to defendant.)

(Mr. McDevitt moves to strike out the word "otherwise" in the second line of the seventh paragraph of the plaintiff's statement.)

(Objection sustained.)

(Exception allowed.)

66 C. P. No. 1, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased.

vs.

DIRECTOR-GENERAL OF RAILROADS.

Philadelphia, November 10, 1919.

Charge of the Court.

PATTERSON, *J.*:

Gentlemen of the Jury: In this case Gertrude Reed, the plaintiff, is suing the Director-General of Railroads, the defendant, for the death of her husband, who had been a flagman in the employ of the defendant, and while so employed received injuries which resulted in his death.

Counsel for the defendant has raised several questions of law. In the hurry incidental to the trial of a case before a jury, it is impossible to pass upon legal questions with the same deliberation and care that may be used by the court in banc. I have therefore ruled on the questions of law raised by the defendant, with the idea that if there should be merit in any of the defendant's contentions, his counsel may present the matter before the court in banc. You
67 will remember that all the testimony in this case has been produced by the plaintiff, the defendant offering none.

Now let me briefly review this testimony to you: It was testified that the dead man was standing on the lower step of a caboose, which was being pushed to a certain place in the yard at Bethlehem, Pa. He was on the side where the engineer had his post on the locomotive, and the conductor was standing on the rear end of the tank, furthest from the deceased.

Because of the caboose being pushed ahead of the engine, it was testified that the engineer could not see the track ahead of him, but had to depend on signals given by someone standing on the forward end of the caboose. On the track ahead of the approaching caboose was what is called a derail, which is an appliance placed on the track, just before a switch, to protect the track into which the switch leads.

The deceased could have seen the derail. He was calling "Whoa, whoa," and was giving the engineer a signal, which one witness testified was recognized by the Philadelphia & Reading Railway as a caution signal, and also as a stop signal. The conductor of the train said that there is no such thing as a caution signal. That the conductor called to the engineer, "Look out for the derail—stop", when the engine was two car lengths from the derail.

It was testified also that at the rear end of the tank, and where

the engineer stood, was an emergency brake appliance, which, if operated, could have stopped the engine within ten feet. It was also said that the deceased had been warned of the derail by the conductor, and that he could have crossed the platform of the caboose, and jumped from the steps on the other side before
68 the derailment. That the caboose struck the derail and was thrown over toward a box car which was standing beside the moving caboose, and thereby the deceased received the injuries which caused his death.

The conductor testified that he had instructed the deceased relative to the movements of the train in these words:

"I told him to have four things in mind: The derail; the switch of No. 2 lumber on the crossing; 337's hind end lying at the station; the derail may be against you. We are going up through No. 1 lumber cross-over in the middle of the yard; put the back on No. 8, and the engine at the round house. I looked at Reed, and I said, 'There is a special coming in. You better get your red flag, and protect us, as we will obstruct the main track in crossing over in the middle of the yard.'" He testified also that if the deceased had been protecting the main track, as instructed, he would have been south of the Third Street crossing.

The plaintiff called Lawrence L. Stevens, an actuary, who testified that according to the mortality tables used in the life insurance business, taking a man 25 years of age, which was the age of the husband of the plaintiff when he died, his life expectancy would be 38 years.

This witness also testified that the present value of $100 payable over a period of 38 years, at 6%, is $1,527.86; at 5%, $1,727.81; and at 4%, $1,974.52.

It was admitted that the train upon which the deceased had been working, was made up in part of cars engaged in interstate commerce, that is, in commerce between two of the states—Pennsylvania and another state. Other facts and details have been shown and you will bear in mind all of the testimony, and not only the
69 brief summary I have set forth. My purpose in stating the facts that I have, is that you may more easily understand the law relating to this case.

Bearing in mind that the testimony is uncontradicted, you must consider its likelihood. It is for you to say whether or not you believe this uncontradicted evidence. Of course you cannot capriciously refuse to believe it, but you should carefully consider it, and then having done so, make up your minds whether you believe it or not. If you do not believe it, your verdict should be for the defendant. If you do believe it, then there are certain matters for you to pass upon.

First of all, were the deceased, and the crew and the cars engaged in interstate commerce at the time of the accident? Of course we know, as a matter of fact, that at the time of the accident, they were not actually handling interstate commerce freight; but that is

not the question. The question is whether or not they were engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. The law is this: that if an employee of an interstate railway carrier is doing something necessarily incident to his day's work, and which partakes of the character of that work as a whole then he is, so far as the Federal Employers' Liability Act is concerned, engaged in interstate commerce.

The testimony is that the deceased was assisting in putting away the caboose and engine which had been used in interstate commerce. I charge you as a matter of law that this would bring the deceased within the Federal Employers' Liability Act.

70 Right here I would like to call your attention to the fact that this case is not like the ordinary negligence case which comes before our Pennsylvania courts. As you are doubtless aware, the cases that are usually tried, are tried under laws that have been enacted by the legislature of the State of Pennsylvania, or under rulings that have been made by the Pennsylvania State Supreme Court, Superior Court, or the County Courts of the Commonwealth of Pennsylvania.

You are also aware that there are other laws which govern the people of the United States. They are those passed by the Congress of the United States, and interpreted by the Supreme Court of the United States, or the Federal Courts, under the constitution and laws of the United States.

The plaintiff in this case seeks to recover under a Federal Statute and its amendments, known as the Federal Employers' Liability Act and one of the provisions of the Federal Act is this:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe (provided that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe)."

71 You will notice that this provision of the Federal Act differs from the Pennsylvania law in this: that under the Pennsylvania law a person guilty of contributory negligence cannot recover a verdict at all, while under the provisions of the Federal statute which I have just read to you, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

The next question that you will consider is as to how the accident really happened—was it caused in any manner by the negligence of the employes of the defendant.

Negligence is defined as the want of care under the circum-

stances—the doing of something that a person of ordinary care and prudence would not do under the circumstances, or the omission to do something that a man of ordinary care and prudence would do under the circumstances.

If you find, from the testimony that the engineer, and the other employes of the defendant company, were using ordinary and reasonable care and caution, and were not, in any way negligent, then your verdict should be for the defendant.

If you find, from the testimony that the engineer, and the other employes of the defendant company, were using ordinary and reasonable care and caution, and were not, in any way negligent, then your verdict should be for the defendant.

If, on the other hand, you find that the engineer of the railroad company was negligent in the manner in which he operated the car, in not obeying signals, or in driving the engine and caboose into what he knew, or should have known under the circumstances, to be a point of danger for the deceased, then your verdict under those circumstances should be for the plaintiff.

If you find in favor the plaintiff, the next question for you
72 to pass upon is whether the deceased was in any way guilty of negligence, or what is called contributory negligence, if any act or omission of his caused or helped to cause the accident—if he did something that a man of ordinary care and prudence would not have done under the circumstances, or failed to do something that a person of ordinary and reasonable caution would have done under the circumstances.

I might say in this connection that both the engineer and the deceased, as well as the other employees who were at that time engaged in operating the engine and caboose, would have to act quickly, because there had arisen a certain emergency; in other words, they had to use their judgment on the spur of the moment, and the question for you to determine is whether or not they did, under those circumstances, which men of ordinary care and caution would have done. They cannot be held responsible for mere errors of judgment.

If you find that the deceased's negligence contributed to the accident, then the question for you to consider is to what extent, because the Act of Congress to which I have already referred, provides that the damages that should be awarded in such a case, should be diminished by the jury in proportion to the amount of negligence attributable to the employe.

Now what are the damages to which the plaintiff in this case would be entitled?

The plaintiff would be entitled to compensation for the deprivation of what she and her child would reasonably expect, had the husband and father continued to live.

The testimony is that the deceased made, at the time of his death, an average of $25 or more, a week; that he was in perfect
73 health, and at the time of his death was 25 years of age. You will take into consideration his age, the condition of his health, his habits, his family relationship, as well as those of his wife

and child, and then try to figure out how long the deceased would probably have lived had this unfortunate accident not occurred.

Certain tables have been referred to—the Carlisle and the American Tables. As the testimony shows, the Carlisle Tables are merely a record of the length of life of a given number of people in the town of Carlisle, in England, taken more than 100 years ago, showing the average expectancy of life of people of certain ages.

I presume that the American Tables are similar, except that they are based upon the life expectancy of people in parts of the United States.

Those tables in themselves do not prove how long the deceased in this case would have lived, had the accident not occurred. You must remember that there might have been a difference of climate, a difference in the mode of living, and in the health environment, and ancestry of the people who were made the subject of the Carlisle and the American tables. You may consider those tables, together with all the other testimony, as well as your experience in the affairs of life, in trying to form an opinion as to how long the deceased in this case might have lived, had the accident not occurred.

Evidence has also been offered to show the present worth of $100 for 38 years at various rates of interest.

There are two things at least that you must remember in reference to this case: One is, that the plaintiff is entitled to recover,
74 if at all, for a sum which would represent only a proportionate amount of the damage actually suffered, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.

Secondly, that if you should award damages in favor of the plaintiff, you are anticipating those damages by giving a round sum of money to the plaintiff, which should be based upon the present value of that man.

The law is clear that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of present value only. You must not award a sum of money to the plaintiff that would bear a rate of interest which would yield annually what you believe the loss to the dead man's estate would be, because at the end of the term the estate of the deceased would not only receive an amount equal to the annual loss which the estate sustained, but also have the principal as well. You must try to award a sum that would represent in principal and interest, the actual loss suffered by the estate, and which would be entirely used up, under those circumstances, at the end of the life expectancy of the deceased.

Remember that the plaintiff in this case is attempting to recover for what she and her child lost by reason of her husband's death. What she received from her husband during his lifetime may be considered by you. Bear in mind, however, that the dead man himself got a living out of his earnings, and clothed himself, and spent some of the money upon himself.

Remember also that the minor child is not entitled to support after reaching 21 years of age. You may also consider the prob-
75 ability of his living, and being employed during his minority.

Now, gentlemen, do I make myself clear to you? Understand the law in this case: First of all, the plaintiff could not get anything unless the defendant's employes were negligent, and that negligence caused the accident. Secondly, if you find from the testimony that the dead man was negligent as well as the engineer of the railroad, and that the dead man's negligence contributed to the accident then, in awarding damages to the plaintiff, you must deduct from the damage sustained by the estate of the dead man a share proportionate to the percentage of negligence which you believe the deceased contributed to the accident. If one-fourth of the negligence was caused by the dead man, then the plaintiff would be entitled to only three-quarters of the damage which he sustained by reason of the accident,—provided that you find that the negligence of the defendant also contributed to or caused the accident.

Now, in the second place, if you should find in favor of the plaintiff, she would be entitled to recover only what she would have received, had her husband not died and had he lived a certain number of years. And, in awarding such a sum, you must not give an amount that will bear annually, as interest, an amount equal to what her annual loss would be, but you must try to capitalize the sum by including in it not only the principal but the interest it bears, so that it will be used up at the end of the life expectancy of the deceased.

They are some of the important things to be remembered in this case.

76 But remember this, that these parties who come into this court are entitled to fair treatment at your hands, and that applies not only to the plaintiff in this case, but to the defendant as well. You must not allow sympathy to influence your judgment, or prejudice to sway it. You must try to be just to both sides.

I have been asked to charge by the plaintiff——

Mr. McDevitt: The plaintiff's points are withdrawn.

I would like to call your Honor's attention to one thing—you said that the conductor told Reed that the derail might be against him. What he said was on page 22: "And you had told Reed that the derail might be against him?

A. Yes, I told the entire crew that."

The Court: I told you before, today, that what I state as my remembrance of the testimony does not bind you at all. It is your recollection, not mine, or Mr. McDevitt's, or Mr. Mason's. You are the ones to remember the testimony and to find the evidence. My duty is to tell you what the law is.

Mr. Mason: May I ask for an exception to your Honor's charge with respect to the employment of the decedent in interstate commerce at the time, and to your Honor's failure to charge upon the question of the character of commerce that the defendant was engaged in, with the instrumentality that caused the injury?

The Court: You mean at the time——

Mr. Mason: The question has to be covered in a dual capacity—the plaintiff himself must be engaged in interstate commerce, and, as I understand it, under the act, the defendant must be engaged in interstate commerce also.

77 The Court: I think I said that if the deceased was assisting in putting away the train that had been engaged in interstate commerce, then, under the law, he would be engaged in interstate commerce. You are excepting to that?

Mr. Mason: Yes.

The Court: I naturally include the train, as well. You contend that he was through with his interstate commerce work and I have told the jury that if they find that he was still working in putting away the train which was engaged in interstate commerce, he was engaged in interstate commerce.

Mr. Mason: I did not understand that you left the question to them in the way you wound up your charge.

The Court: Here is what I said:

"First of all, were the deceased, and the crew and the cars engaged in interstate commerce at the time of the accident? Of course we know, as a matter of fact, that at the time of the accident, they were not actually handling interstate commerce freight; but that is not the question. The question is whether or not they were engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. The law is this: that if an employee of an interstate railway carrier is doing something necessarily incident to his day's work, and which partakes of the character of that work as a whole, then he is, so far as the Federal Employers' Liability Act is concerned, engaged in interstate commerce. The testimony is that the deceased was assisting in putting away the caboose and engine which had been used in interstate commerce. I charge you as a matter of law that this would bring the deceased within the Federal Employers' Liability Act."

Mr. Mason: That is what I understood.

78 The Court: I meant, providing the jury believe the testimony.

Mr. Mason: The testimony is not disputed.

The Court: No, it is not disputed.

Mr. Mason: I say now that, so far as the testimony is concerned, it is to be believed. I expect them to believe the testimony. I ask them to do so. Your Honor will give me an exception to that part of your charge?

(Exception allowed.)

And then your Honor's charge in regard to the question of negligence, in so far as the acts of the engineer are concerned, and of any other members of the crew.

The Court: I did say that, although under the evidence it is really just between the engineer and the deceased. So that you may leave out any question of negligence on the part of anybody employed by the Railroad Company at that time excepting the engineer, and the man who was killed.

Mr. Mason: Then that part of your Honor's charge which relates to contributory negligence, because I understand the law to be that if the cause of the accident was Reed's negligence, himself, it would

eliminate any recovery at all,—if his was the proximate and practically the sole cause, then there could be no recovery whatever.

The Court: I will charge you that way. I thought I did. First of all, if you find from the testimony that the defendant's servant or employe, did no act of negligence to cause this unfortunate accident then you must find in favor of the defendant. Or, if you find that
the real cause of the decedent's death was his own negligence,
79 not in any way assisted by the negligence of the engineer, then you must find in favor of the defendant.

Mr. Mason: That covers it.

And just that part of your Honor's charge which reflects the evidence on the question of damages.

(Exception allowed.)

The Court: I refuse the defendant's point.

(Defendant's point refused and not read, is as follows:

"Under all the evidence in this case your verdict must be for the defendant.")

(Exception to counsel for defendant as to refusal of defendant's point refused.)

On motion of counsel for defendant made before the jury retires, the Court directs the stenographer to transcribe and file of record his stenographic notes of the evidence, with the objections thereto and rulings thereon, and of the charge of the court with the exceptions thereto.

I hereby certify that the proceedings, evidence and charge of the court are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this is a correct transcript of the same.

ERNEST N. ROSS,
Official Stenographer.

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

JOHN M. PATTERSON,
Judge.

Endorsement: No. 2226, June Term, 1918, C. P., No. 1. Gertrude M. Reed, etc., vs. Director-General of Railroads. Transcript of Official Stenographic Record. Filed Nov. 24, 1919. Browns, Pro Proth'y.

80 THE SUPREME COURT OF PENNSYLVANIA,
Eastern District, City and County of Philadelphia, ss:

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas No. 1 for the County of Philadelphia, Greeting:

We being willing for certain causes, to be certified of the matter of the Appeal of Director General of Railroads, United States Rail-

road Administration, operating Philadelphia & Reading Railroad on behalf of United States of America, from the judgment of your said Court at No. 2226 of June Term, A. D. 1918, wherein Gertrude M. Reed, Administratrix of Estate of Leo C. Reed, Dec'd, was Plaintiff and the said appellants were Defendants, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the fourth Monday of March next (1920) so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the Laws of the said State ought.

Witness, the Honorable J. Hay Brown, Doctor of Laws, Chief Justice of our said Supreme Court at Philadelphia, the Fifteenth day of December in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] WILLIAM A. STONE,
Prothonotary.

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, Sitting in and for the Eastern District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

[SEAL.]
JOHN M. PATTERSON. [SEAL.]

[Endorsed:] No. 2226, June Term, 1918. C. P., No. 1, Phila. Co., No. 203, January Term, 1920. Supreme Court. Gertrude M. Reed, Admrx. of Estate of Leo C. Reed, dec'd, v. Director General of Railroads, United States Railroad Administration, Operating Philadelphia & Reading Railroad, Appellants. Certiorari to the Court of Common Pleas No. 1 for the County of Philadelphia. Returnable the Fourth Monday of March, 1920. Rule on the Appellee, to appear and plead on the Return-day of the Writ. William A. Stone, Prothonotary. Dec. 22, 1919, brought into office. R. Richardson, Prothonotary. Filed in Supreme Court, Jan. 14, 1920, Philadelphia. Wm. Clarke Mason.

81 In the Supreme Court of Pennsylvania for the Eastern District.

Court of Common Pleas, No. 1, of the County of Philadelphia, June Term, 1918.

No. 2226.

GERTRUDE M. REED, Administratrix of Estate of Leo C. Reed, Dec'd, Plaintiff,

—

DIRECTOR GENERAL OF RAILROADS, United States Railroad Administration, Operating Philadelphia & Reading Railroad, Defendant.

Enter appeal on behalf of Director General of Railroads, United States Railroad Administration, operating Philadelphia & Reading Railroad on behalf of United States of America from the judgment of the Court of Common Pleas, No. 1, of the County of Philadelphia.

WM. CLARKE MASON,
Attorney for Appellant.

William A. Stone, Prothonotary.

SUPREME COURT, EASTERN DISTRICT.
County of Philadelphia, ss:

Charles H. Ewing, Federal Manager for defendant, being duly sworn saith that said Appeal is not taken for the purpose of delay, but because he believes appellant has suffered injustice by the judgment from which he appeals.

CHARLES H. EWING.

Sworn to and subscribed, this 9th day of December, A. D. 1919.
[SEAL.] CLARENCE K. KLINK,
Notary Public.

My commission expires April 18, 1923.

[Endorsed:] No. 203, January Term, 1920. Supreme Court of Pennsylvania, Eastern District. Gertrude M. Reed, Admrs., &c., v. Director General of Railroads et al., Appellants. Appeal and Affidavit. Filed in Supreme Court, Dec. 15, 1919, Philadelphia. —— ——, Attorney for Appellant.

82 In the Supreme Court of Pennsylvania for the Eastern District, January Term, 1920.

No. 203.

GERTRUDE M. REED, Adm'x of Estate of Leo C. Reed, Dec'd,

vs.

DIRECTOR GENERAL OF RAILROADS, &c., Appellant.

Assignments of Error.

1. The learned trial Judge erred in refusing to charge the jury as requested by defendant, to wit (*p. 56a*):

The Court: "I refuse the defendant's point."

(Defendant's point refused and not read, is as follows:

Under all the evidence in this case your verdict must be for the defendant."

(Exception to counsel for defendant as to refusal of defendant's point refused.)

2. The learned Court below erred in refusing defendant's motion for judgment non obstante veredicto, as follows (*pp. 61a-63a*):

Motion for Judgment N. O. V.

And now, November 14, 1919, the defendant Director General of Railroads, by his counsel, Wm. Clarke Mason, Esq., moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record, for the following reasons:

1. Because the record shows that the cause proved is not the cause of action pleaded in the plaintiff's statement of claim, and this variance is a bar to a recovery.

2. Because the evidence produced by the plaintiff fails to show any negligence by any servant of the defendant other than the negligence of the decedent Reed.

3. Because the risks incident to the movement of the train toward the derail were assumed by Reed, and there can be no recovery under the Federal Employers' Liability Act.

4. Because the evidence fails to show that at the time of the accident Reed was engaged in interstate commerce, and there can be no recovery under the Federal Employers' Liability Act.

83 5. Because there is no evidence to show that the box car which caused the injury to the decedent Reed, was being used by the defendant as an instrumentality of interstate commerce, and

therefore there is no evidence to show that the defendant was engaged in interstate commerce at the time of the accident.

6. Because the finding by the jury, under the charge of the learned trial Judge, that the death of the decedent Reed was due to the negligence of the defendant while the defendant was engaged in interstate commerce and the decedent Reed was employed in interstate commerce, is a finding without any evidence to support it, and a judgment entered upon such verdict would be in violation of the rights of the defendant secured by the XIVth Amendment to the Constitution of the United States of America.

7. Because the learned trial Judge refused to charge the jury as requested by defendant, to wit: "Under all the evidence in this case your verdict must be for the defendant."

WM. CLARKE MASON,
Counsel for Defendant.

(Refusal of Motion for Judgment N. O. V. and Exception Thereto.)

(As appears upon the Docket Entries.)

1919, Nov. 7. Jury Called.
" " 10. Verdict for plaintiff $19,000.
" " 14. Defendant's motion for judgment n. o. v. filed.
" " 28. Motion refused; exception for defendant.
" Dec. 2. By writing filed plaintiff remits all of verdict in excess of $15,000.

WM. CLARKE MASON,
Counsel for Appellant.

Endorsement: No. 203. Jan'y term, 1920. Supreme Court of Pennsylvania. Gertrude M. Reed, Adm'n'x of Estate of Leo C. Reed, Dec'd, vs. Director General of Railroads, &c., Appellant. Assignments of Error. Filed in Supreme Court Mar. 11, 1920, Philadelphia. Wm. Clarke Mason, Attorney at Law, 614-617 Franklin Building, Philadelphia, Pa.

84 In the Supreme Court of Pennsylvania for the Eastern District, January Term, 1920.

No. 203.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased,

vs.

DIRECTOR GENERAL OF RAILROADS, United States Railroad Administration, Operating the Philadelphia and Reading Railroad, Appellant.

Appeal from the Judgment of the Court of Common Pleas, No. 1, of Philadelphia County.

Filed April 12, 1920.

SIMPSON, J.:

Plaintiff, as administratrix of her deceased husband's estate, brought an action of trespass, averring he was negligently killed while working for defendant in interstate commerce. A verdict and judgment having been entered for plaintiff, defendant appeals, inter alia, because its point for binding instructions was refused and its motion for judgment non obstante veredicto dismissed. Complaint is made that these decisions are erroneous for several reasons, but we will consider only one thereof, viz: did decedent's death result from a risk which he assumed as the result of his employment? If it did plaintiff cannot recover.

Taking the evidence in the light most favorable to plaintiff, as of course we must do, we find the facts to be as follows: Decedent was a member of a crew which had brought a train from Philadelphia to South Bethlehem. Some of the cars contained goods shipped in interstate commerce. When all the cars were released at their appropriate places, the engine went back to get the caboose for the purpose of taking it to the point where it was to stay until wanted for further traffic, and then itself go to the roundhouse where it re-
85 mained until again needed. This movement was through defendant's yard, where there were a number of tracks upon which cars and locomotives were being shifted constantly. Through the yard ran also the main passenger tracks of defendant, and at the points where other tracks crossed over or connected therewith, derailing devices had been wisely installed for the purpose of preventing locomotives and cars using the other tracks from running on to or over the passenger tracks, at a time when passenger trains were standing or moving thereon, and thereby possibly causing collision and serious loss of life.

The engine and caboose which had reached South Bethlehem were moving over a track which had one of those derailing devices where it connected with the passenger tracks. The caboose being in front of

the locomotive the engineer could not see the device when operating the engine from his cab, and hence decedent was directed to and did locate himself on the front of the caboose, with a duty to signal the engineer in time for him to safely stop if the derailing device was set against further passage. It was so set on this occasion, but either through the negligence of decedent himself, or of the engineer in not noticing or heeding the signalling of decedent, the latter did not stop in time, the caboose was derailed and decedent was crushed to death between it and cars on an adjoining track. In considering the present question we also assume the negligence was that of the engineer and not of decedent.

Under the Federal Employers' Liability Act, one engaged in interstate commerce is not absolutely deprived of recovery because of his contributory negligence; but neither he nor those claiming under him can recover if an accident results from a risk assumed by him in the performance of his duties. The only exceptions to this are where the accident is the result of a breach of some statutory duty, in which event the employee is protected by Section 1 of the Act
(Seaboard Air Line Railway Co., v. Horton, 233 U. S. 492;
86 Southern Railway Co., v. Crockett, 234 U. S. 725); or where the risk is so unusual or extraordinary as to be outside of those normally and necessarily incident to the employment: Dutrey v. Phila. & Reading Railway Co., 265 Pa. 215. Neither of these exceptions have any application here.

In the present case decedent knew of the risks he assumed in the movement of the engine and caboose through the yard; he knew the place was a dangerous one; he knew that if he did not warn the engineer in time, or if the latter did not see or heed the signals, the engine and caboose would be derailed, a collision with engines or cars on other tracks was probable, and he might be injured or killed as a result thereof. In other words he was engaged in a well known dangerous yard movement; and the Supreme Court of the United States, which is, of course, the final arbiter in construing the Federal Employers' Liability Act, has repeatedly held that under such circumstances the person injured assumes the ordinary risks of his employment and no recovery can be had if injury or death results therefrom: Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478; Tuttle v. Detroit, Grand Haven & Milwaukee Rwy. Co., 122 U. S. 189; Seaboard Air Line Railway Co. v. Horton, supra; Reese v. Phila. & Reading Rwy. Co., 239 U. S. 463; Jacobs v. Southern Rwy. Co., 241 U. S. 229; Boldt v. Penna. R. R. Co., 245 U. S. 441.

Of course if the cases in this court conflicted with the foregoing, our decisions would have to give way; but happily they do not. Glunt v. Penna. R. R. Co., 249 Pa. 522, like Chesapeake & Ohio R. R. Co. v. De Atley, 241 U. S. 310, was the case of an injury resulting from an unusual rate of speed, which was not an ordinary risk of the employment. Waina v. Pennsylvania Co., 251 Pa. 213, was a case of alleged contributory negligence which, as already stated, is not an absolute defence under the Federal Employers' Liability Act. Falyk v. Penna. R. R. Co., 256 Pa. 397, was decided on the ground

87 that plaintiff had not been given a safe place to work and was lulled into a belief he was secure by "the master's assurance that signals were unnecessary". And, finally, in Dutrey v. Phila. & Reading Rwy. Co., 265 Pa. 215, as in McGovern v. Phila. & Reading Rwy. Co., 235 U. S. 387, there was a failure to observe a custom which required notice to be given of the approach of trains. We must, therefore, enter judgment for defendant non obstante veredicto.

It may be added that this is one of an increasing number of cases demonstrating the wisdom of speedily extending to all interstate employees the benefit of the Act of Congress of October 6, 1917, by which stevedores engaged in interstate commerce became entitled to "rights and remedies under the workmen's compensation law of any state". It is not understandable why a state should not be permitted to exercise its police power over this as it does in many other matters, merely because the employee was engaged in interstate commerce at the time of his injury or death, in view of the fact that if he or his dependents become a public charge because thereof the state must out of its own funds support him or them; especially as those statutes are commonly admitted to be alike beneficial to the employee, the carrier and the public.

The judgment of the court below is reversed and judgment is here entered for defendant non obstante veredicto.

Kephart, J. Dissents.

88 In the Supreme Court of Pennsylvania for the Eastern District, January Term, 1920.

No. 203.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased,

vs.

DIRECTOR GENERAL OF RAILROADS, Appellant.

Petition for Reargument.

To the Honorable the Chief Justice and Justices of the Supreme Court of the State of Pennsylvania:

The Petition of John J. McDevitt, Jr., respectfully represents:

1. That he is counsel of record for the appellee in the above entitled action.

2. That a verdict was obtained by the plaintiff, as administratrix, for $15,000, damages for the death of her husband.

3. That the appeal of the defendant below was argued before your Honorable Court on March 22nd, 1920.

4. That the argument on appeal was heard by the Honorable Chief Justice and Justices Stewart, Walling, Kephart and Simpson.

5. That the opinion of your Honorable Court was filed by the Honorable Justice Simpson on the 12th day of April, A. D. 1920 (with Justice Kephart dissenting) reversing the judgment of
89 the Court below, and entering Judgment N. O. V. a copy of the said Opinion being attached hereto, and marked "Exhibit A".

6. We respectfully represent that the said Opinion is inconsistent with the well founded principles of law and decisions of your Honorable Court.

(*a*) In holding in effect that the decedent's failure to have anticipated the engineer's negligence created an assumption of risk, since an assumption of risk can only be charged where the risk was known and obvious, and in the case at bar it was not.

(*b*) The decedent had a right to assume that the engineer would exercise due care, and your Honorable Court properly holds he was negligent, Shields vs. P. R. T., 261 Pa. 422.

(*c*) To sustain this Opinion would mean, logically that no railroad employee could recover damages, since any position assumed by him would be construed as an assumption of risk, unless excepted by the Statute.

(*d*) The manner of negligence or character of negligence under the authorities does not effect the assumption of risk. Here the negligence of the engineer and not his position was the proximate cause of decedent's death.

We do respectfully contend that under the cases cited and particularly Lamb vs. P. R. T., 259, Pa. 536, the question of assump-
90 tion of risk, if any, was for the jury.

(*e*) Negligence of the engineer being admitted in the Opinion of your Learned Court, and being something that the decedent was not required to anticipate there could be no assumption of risk, and furthermore, the Federal Act eliminates the defense of co-employment as well as contributory negligence.

7. At the said argument when your Petitioner undertook to discuss the case generally, the Learned Chief Justice required him to confine his argument to, and it was made clear at that time as it had been from the beginning of the argument, that the only point in issue was whether or not the action was one within the Federal Employers' Liability Act; to wit, whether the engine was engaged in interstate commerce or intrastate commerce.

8. We respectfully submit that the error in this case results from thus restricting the argument and that a complete argument will fully sustain our position.

We, therefore, respectfully request an opportunity to orally argue the point made the basis of the decision of your Honorable Court. Your Honorable Court is therefore further requested to make an order directing the Prothonotary to retain the record until the disposition of this Petition, and if disposed of unfavorably, nevertheless to retain the said record pending the perfection of an appeal to the Supreme Court of the United States.

91 And your Petitioner will ever pray, etc.

JOHN J. McDEVITT, JR.

92 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

John J. McDevitt Jr., being duly sworn according to law deposes and says that he is the Petitioner in the foregoing Petition and that the facts herein contained are true and correct to the best of his knowledge, information and belief.

JOHN J. McDEVITT, JR.

Sworn to and subscribed before me this 14th day of April, A. D. 1920.

[SEAL.] GEORGE V. R. SCURRID,
Notary Public.

My Commission Expires June 19, 1923.

93 EXHIBIT "A."

In the Supreme Court of Pennsylvania for the Eastern District January Term, 1920.

No. 203.

Appeal from the Judgment of the Court of Common Pleas No. 1 of Philadelphia County.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased.

vs.

DIRECTOR GENERAL OF RAILROADS, United States Railroad Administration, Operating the Philadelphia and Reading Railroad, Appellant.

Opinion of the Court.

SIMPSON, *J.:*

Plaintiff, as administratrix of her deceased husband's estate, brought an action of trespass, averring he was negligently killed while working for defendant in interstate commerce. A verdict and judgment having been entered for plaintiff, defendant appeals, inter alia, because its point for binding instructions was refused and

its motion for judgment non obstante veredicto dismissed. Complaint is made that these decisions are erroneous for several reasons, but we will consider only one thereof, viz: did decedent's death result from a risk which he assumed as the result of his employment? If it did plaintiff cannot recover.

Taking the evidence in the light most favorable to plaintiff, as of course we must do, we find the facts to be as follows: Decedent was a member of a crew which had brought a train from South Bethlehem to Philadelphia. Some of the cars contained good-
94 shipped in interstate commerce. When all the cars were released at their appropriate places, the engine went back to get the caboose for the purpose of taking it to the point where it was to stay until wanted for further traffic, and then itself go to the roundhouse where it remained until again needed. This movement was through defendant's yard, where there were a number of tracks upon which cars and locomotives were being shifted constantly. Through the yard ran also the main passenger tracks of defendant, and at the points where other tracks crossed over or connected therewith, derailing devices had been wisely installed for the purpose of preventing locomotives and cars using the other tracks from running on to or over the passenger tracks, at a time when passenger trains were standing or moving thereon, and thereby possibly causing collision and serious loss of life.

The engine and caboose which had come from South Bethlehem were moving over a track which had one of those derailing devices where it connected with the passenger tracks. The caboose being in front of the locomotive the engineer could not see the device when operating the engine from his cab, and hence defendant was directed to and did locate himself on the front of the caboose, with a duty to signal the engineer in time for him to safely stop if the derailing device was set against further passage. It was so set on this occasion, but either through the negligence of decedent himself, or of the engineer in not noticing or heeding the signalling of decedent, the latter did not stop in time, the caboose was derailed and decedent was crushed to death between it and cars on an adjoining track. In considering the present question we also assume the negligence was that of the engineer and not of decedent.

95 Under the Federal Employers' Liability Act, one engaged in interstate commerce is not absolutely deprived of recovery because of his contributory negligence; but neither he nor those claiming under him can recover if an accident results from a risk assumed by him in the performance of his duties. The only exceptions to this are where the accident is the result of a breach of some statutory duty, in which event the employee is protected by Section 4 of the Act (Seaboard Air Line Railway Co., v. Horton, 233 U. S. 492; Southern Railway Co., v. Crockett, 234 U. S. 725); or where the risk is so unusual or extraordinary as to be outside of those normally and necessarily incident to the employment: Dutrey v. Phila. & Reading Railway Co., 255 Pa. 215. Neither of these exceptions have any application here.

In the present case decedent knew of the risks he assumed in the movement of the engine and caboose through the yard; he knew the place was a dangerous one; he knew that if he did not warn the engineer in time, or if the latter did not see or heed the signals, the engine and caboose would be derailed, a collision with engines or cars on other tracks was probable, and he might be injured or killed as a result thereof. In other words he was engaged in a well known dangerous yard movement; and the Supreme Court of the United States which is, of course, the final arbiter in construing the Federal Employers' Liability Act, has repeatedly held that under such circumstances the person injured assumes the ordinary risks of his employment and no recovery can be had if injury or death results therefrom: Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478; Tuttle v. Detroit, Grand Haven & Milwaukee Rwy. Co., 122 U. S. 189; Seaboard Air Line Railway Co., v. Horton, supra; Reese v. Phila. & Reading Rwy. Co., 239 U. S. 463; Jacobs vs. Southern Rwy. Co., 241 U. S. 229; Boldt v. Penna. R. R. Co., 245 U. S. 441.

Of course if the cases in this court conflicted with the foregoing our decisions would have to give way; but happily they do not. Glunt v. Penna. R. R. Co., 249 Pa. 522, like Chesapeake & Ohio R. R. Co., v. De Atley, 241 U. S. 310, was the case of an injury resulting from an unusual rate of speed, which was not an ordinary risk of the employment. Wains v. Pennsylvania Co., 251 Pa. 213, was a case of alleged contributory negligence which, as already stated, is not an absolute defense under the Federal Employers' Liability Act. Falvk v. Penna. R. R. Co., 256 Pa. 397, was decided on the ground that plaintiff had not been given a safe place to work and was lulled into a belief he was secure by "the master's assurance that signals were unnecessary." And, finally, in Dutrey v. Phila. & Reading Rwy. Co., 265 Pa. 215, as in McGovern v. Phila. & Reading Rwy. Co., 235 U. S. 387, there was a failure to observe a custom which required notice to be given of the approach of trains. We must, therefore, enter judgment for defendant non obstante veredicto.

It may be added that this is one of an increasing number of cases demonstrating the wisdom of speedily extending to all interstate employees the benefit of the Act of Congress of October 6, 1917, by which stevedores engaged in interstate commerce became entitled to "rights and remedies under the workman's compensation law of any state." It is not understandable why a state should not be permitted to exercise its police power over this as it does in many other matters, merely because the employee was engaged in interstate commerce at the time of his injury or death, in view of the fact that if he or his dependents become a public charge because thereof the state must out of its own funds support him or them, especially as those statutes are commonly admitted to be alike beneficial to the employee, the carrier and the public.

The judgment of the court below is reversed and judgment is here entered for defendant non obstante veredicto.

Endorsement: Page 272. In the Supreme Court of Pennsylvania for the Eastern District. No. 203, January Term, 1920. Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, deceased, vs. Director General of Railroads, Appellant. Petition for re-argument. John J. McDevitt, Jr., Petitioner, 811 Pennsylvania Bldg. Filed in Supreme Court Apr. 15, 1920, Philadelphia. April 19, 1920, Re-argument refused. Per Curiam.

98 In the Supreme Court of Pennsylvania for the Eastern District, January Term, 1920.

No. 203.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased.

vs.

DIRECTOR GENERAL OF RAILROADS, Appellant.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Pennsylvania:

The Petition of Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, deceased, respectfully represents:

1. That she is the appellee in the above mentioned action.

2. That on Monday, April 12th, 1920, an Opinion of your Honorable Court was filed reversing the judgment of Court of Common Pleas No. 1 of Philadelphia County, and entering judgment non obstante veredicto in favor of the defendant below, the Philadelphia & Reading Railway Company, appellant, in a cause of action instituted under the Federal Employers' Liability Act of 1898 and its supplements.

3. That the question presented by the Assignments of Error in this case involved questions arising under the said Federal Employers' Liability Act, the application of the said Statute, to the facts of this case, and the limitations upon the rights of action under the said Act.

99 4. The said questions involving as they do the Acts of Congress, the Rules and decisions of the Supreme Court of the United States and other Federal Questions, your Petitioner has the right of appeal to the Supreme Court of the United States.

5. That under the Act of Congress and Rules of the Supreme Court of the United States it is necessary that petitions for writs of certiorari in matters of this character be filed within three months, and it is further provided that printed copies of the Petition for the writ of certiorari and briefs in support thereof shall be filed, and notice of the date of the submission of the Petition together with a

copy of the Petition and brief in support of the same shall be filed on respondent within two weeks before such date.

6. Your Petitioner is prepared to perfect the record in this case and to file Petition for writ of certiorari in the Supreme Court of the United States on or before the 15th day of June, 1920.

7. That your Petitioner is advised that in order that the proceedings may remain in their present status pending the disposition of such petition for a writ of certiorari, a special order of this Court is required to stay the issuing of the mandate.

Wherefore your Petitioner prays that this Court enter an order directing the Prothonotary of your Honorable Court to hold the mandate in this cause pending the filing of the aforesaid petition for writ of certiorari in the Supreme Court of the United States until the 15th day of June, 1920, and that if said Petition shall be
100 filed in the Supreme Court of the United States on or before that day that the mandate be further held until the Supreme Court of the United States shall act upon the said Petition for the writ of certiorari aforesaid.

And your Petitioner will ever pray, etc.

GERTRUDE M. REED,
Administratrix, etc.,
By JOHN J. McDEVITT, JR.,
Counsel.

101 *Order.*

And now, to wit this 26th day of April A. D. 1920, upon consideration of the foregoing Petition and upon motion of John J. McDevitt, Jr., Esq., counsel for Gertrude M. Reed, administratrix of the Estate of Leo C. Reed, deceased, Appellee, it is ordered that the mandate in the above entitled case shall not issue but shall be stayed until June 15th, 1920, and that if on or before that day there shall be filed with the Prothonotary of this Court an Affidavit of Counsel for Gertrude M. Reed, administratrix of the Estate of Leo C. Reed, deceased, showing that a Petition for a writ of certiorari has been filed by the said appellee in the Supreme Court of the United States that the mandate shall be held for a further period thereafter, and shall not issue before final disposition shall be made by the Supreme Court of the United States of the Petition for a writ of certiorari aforesaid,

BROWN, *C. J.*

Endorsement. Page 275. In the Supreme Court of Pennsylvania for the Eastern District. No. 263, January Term, 1920. Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, Deceased, vs. Director General of Railroads, Appellant. Petition to Stay the Mandate Pending Application to the Supreme Court of the United States for Writ of Certiorari. Filed in Supreme Court, Apr. 21, 1920. Philadelphia. John J. McDevitt, Jr., 811 Pennsylvania Bld'g. Att'y for Appellee. April 26, 1920. Petition granted Per Curiam.

102 In the Supreme Court of Pennsylvania, for the Eastern District, January Term, 1920.

No. 203.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased,

vs.

DIRECTOR GENERAL OF RAILROADS, Appellant.

Petition for Reconsideration.

To the Honorable the Chief Justice and Justices of the Supreme Court of the State of Pennsylvania:

The Petition of Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, deceased, by her attorney, John J. McDevitt, Jr., respectfully represents:

1st. Your Petitioner respectfully advises your Honorable Court that since the decision herein and dismissal of Motion for re-argument, in the last Advance Sheets of the United States Supreme Court Reporter, delivered April 21st, 1920, there appears an Opinion in Chicago, R. I. & P. Rwy. Co. vs. Ward, (40 Supreme Court Reporter, page 276, Advance Sheets dated April 15th, 1920) a copy of which is hereto attached and marked "Exhibit A."

2nd. The said decision is in direct variance with the conclusion reached by Your Honorable Court, and your Petitioner feels constrained to respectfully submit said decision, in this way,
103 for such consideration as your Honorable Court may deem proper.

3rd. The said decision on its facts we respectfully suggest bears a complete practical analogy to the facts of the case at bar, being also a yard operation. In addition to this in the case at bar the proximate cause of the accident was the negligence of the engineer; in the case referred to it was likewise the negligence of a fellow servant. The responsibility of the employer, for the negligence of a fellow servant is fixed by the Federal Act, and the said decision makes it clear that such negligence is not per se an "assumed risk."

We, therefore, respectfully submit for Your consideration this copy of the said decision, feeling that good faith demands this, the record being within the control of your Honorable Court.

The appeal to the Supreme Court of the United States not having been perfected, we respectfully suggest that this Opinion although published since the filing of the Opinion of your Honorable Court antedated it, and is, therefore, a controlling decision on the points of law involved herein.

And your Petitioner will ever pray, etc.

Respectfully submitted.

JOHN J. McDEVITT, Jr.,
Attorney.

104 "EXHIBIT A."

CHICAGO, R. I. & P. RWY. CO.

vs.

WARD.

(40 Sup. Ct. Rep., p. 276. Adv. Sheets dated Apr. 15, 1920.)

Mr. Justice Day delivered the opinion of the Court.

Suit was brought in the superior court, Pottawatomie County, Oklahoma, against the Chicago, Rock Island & Pacific Railway Company and A. J. Carney to recover damages for injuries alleged to have been received by Ward while he was employed as a switchman of the railway company in its yards at Shawnee. He recovered a judgment which was affirmed by the Supreme Court of Oklahoma, 173 Pac. 212. The ground upon which recovery was sought against the railway company and Carney, who was an engine foreman, was that Ward, while engaged in his duty as a switchman, was suddenly thrown from the top of a box car upon which he was about to apply a brake. The petition alleged, and the testimony tended to show, that ward was engaged as a switchman on a cut of cars which it was the duty of the engine foreman to cut loose from the engine pushing the cars in order that Ward might gradually stop the cars by applying the brake. It appears that at the time of the injury to Ward, the cut of cars had been pushed up an incline by the engine, over an elevation, and as the cars ran down the track the effect was to cause the slack to run out between them permitting them to pull apart sufficiently to be uncoupled, at which time it was the duty of the engine foreman to uncouple the cars. The testimony tended to support the allegations of the petition as to the negligent manner in which this operation was performed at the time of the injury, showing the failure of the engine foreman to properly cut off the cars at the time he directed the engineer to retard the speed
105 of the engine, thereby causing them to slow down in such a manner that when the check reached the car upon which Ward was about to set the brake, he was suddenly thrown from the top of the car with the resulting injuries for which he brought this action.

The railway company and Carney took issue upon the allegations of the petition, and set up contributory negligence and assumption of risk as defenses. The trial court left the question of negligence on the part of the company and the engine foreman to the jury, and also instructed it as to assumption of risk by an employe of the ordinary hazards of the work in which he was engaged, and further charged the jury as follows:

"You are further instructed that while a servant does not assume the extraordinary and unusual risks of the employment yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise,

and also all risks which he knows or should, in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the master's negligence nor such as are latent, or are only discoverable at the time of the injury. The doctrine of an assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knew, or in the exercise of reasonable and ordinary care, should know the risk to which he is exposed, he will, as a rule, be held to have assumed them; but where he either does not
106 know, or knowing, does not appreciate such risk, and his ignorance or nonappreciation is not due to negligence or want of care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries."

Treating the case, as the court below did, as one in which the injury occurred while the petitioners and respondent were engaged in interstate commerce, this charge as to the assumption of risk was not accurate, in stating without qualification that the servant did not assume the risk created by the master's negligence. We have had occasion to deal with the matter of assumption of risk in cases where the defense is applicable under the Federal Employers' Liability Act (Comp. St. 8657-8665), being those in which the injury was caused otherwise than by the violation of some statute enacted to promote the safety of employes. As this case was not one of the latter class, assumption of risk was a defense to which the defendants below were entitled. Seaboard Air Line R. R. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Jacobs v. Southern Railway Co., 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970.

As to the nature of the risk assumed by an employe in actions brought under the Employers' Liability Act, we took occasion to say in Chesapeake & Ohio Railway Co. v. De Atley, 241 U. S. 310, 315, 36 Sup. Ct. 564, 566 (60 L. Ed. 1016):

"According to our decisions, the settled rule is not that it
107 is the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

The federal Employers' Liability Act places a co-employe's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313, 36 Sup. Ct. 564, 60 L. Ed. 1016. See also Chesapeake & Ohio R. Co. v. Proffitt, 241 U. S. 462, 468, 36 Sup. Ct. 620, 60 L. Ed. 1102; Erie Railway Co. v. Purucker, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166.

Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached.

For the lack of proper care, on the part of the representative
108 of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of though inaccurate could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assume the risk.

The trial court also charged that contributory negligence by Ward would prevent a recovery. This charge was more favorable to the petitioners than they were entitled to, as under the Federal Employers' Liability Act contributory negligence is not a defense, and only goes in mitigation of damages. The giving of this charge could not have been prejudicial error requiring a reversal of the judgment.

Another assignment of error, dealt with by the Supreme Court of Oklahoma, that a jury of less than 12 returned the verdict, conforming to the state practice, does not seem to be pressed here. In any event it is disposed of by St. Louis & San Francisco R. R. Co. v. Brown, 241 U. S. 223, 36 Sup. Ct. 602, 60 L. Ed. 966.

109 We find no error in the judgment of the Supreme Court of Oklahoma and the same is

Affirmed.

Endorsement: In the Supreme Court of Pennsylvania for the Eastern District. No. 203, January Term, 1920. Gertrude M. Reed, administratrix of the estate of Leo C. Reed, deceased, vs. Director General of Railroads, appellant. Petition for re-consideration. Filed in Supreme Court Apr. 28, 1920, Philadelphia. John J. McDevitt, Jr., attorney, 811 Pennsylvania Bldg.

110 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1920.

No. 203.

GERTRUDE M. REED, Adm'r'x of Estate of Leo C. Reed, Dec'd,

v.

DIRECTOR GENERAL OF RAILROADS.

Appeal from C. P., No. 1, Phila.

In re Petition for Reconsideration of Action on Application for Reargument.

May 4, 1920. Petition dismissed.

PER CURIAM.

Endorsement: 203. Jan. T., 1920, Supreme Court. Gertrude M. Reed, Adm'x &c., v. Director General of Railroads. Sur Petition for Re-consideration of action on application for Re-argument. Order of Court dismissing petition. Filed Supreme Court, May 4, 1920, Philadelphia.

111 January Term, 1920.

203.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Dec'd, Plaintiff.

v.

DIRECTOR GENERAL OF RAILROADS, United States Railroad Administration, Operating Philadelphia and Reading Railroad, Defendants.

Appeal of Defendants, No. 2226, June Term, 1918, from the Judgment.

Wm. Clarke Mason.
April 28, 1920. Petition for reconsideration filed.
May 4, 1920. Petition dismissed: Per Curiam.
Appeal from Court of Common Pleas, No. 1, of the County of Philadelphia.
Filed December 15, 1919.
Eo die. Certiorari exit.
Retble. fourth Monday March, 1920.
January 14, 1920. Record returned & filed.
March 11, 1920. Assignments of error filed.

March 22, 1920. Argued.

April 12, 1920. The judgment of the court below is reversed and judgment is here entered for defendant non obstante veredicto. Opinion by Simpson, J. Kephart, J. dissents.

April 15, 1920. Petition for re-argument filed. John J. McDevitt, Jr., Attorney for Appellee.

April 19, 1920. Re-argument refused. Per Curiam.

April 21, 1920. Petition to stay the Mandate pending application to the Supreme Court of the United States for Writ of Certiorari filed.

And Now, to wit, this 26th day of April, A. D. 1920, upon consideration of the foregoing Petition and upon motion of John J. McDevitt, Jr., Esq., counsel for Gertrude M. Reed, administratrix of the Estate of Leo C. Reed, deceased, Appellee, it is ordered that the mandate in the above entitled case shall not issue but shall be stayed until June 15th, 1920, and that if on or before that day there shall be filed with the Prothonotary of this Court an Affidavit of Counsel for Gertrude M. Reed, administratrix of the Estate of Leo C. Reed, deceased, showing that a Petition for a writ of certiorari has been filed by the said appellee in the Supreme Court of the United States that the mandate shall be held for a further period thereafter, and shall not issue before final disposition shall be made by the Supreme Court of the United States of the Petition for a Writ of Certiorari aforesaid.

BROWN, *C. J.*

April 27, 1920. Certificate exit and sent to Prothonotary of Philadelphia Co.

112 STATE OF PENNSYLVANIA,
Eastern District:

I, Rudolph M. Schick, Prothonotary pro tem. of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the entire record in the above entitled cause, so full and entire as appears of record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 11th day of May, A. D. 1920.

RUDOLPH M. SCHICK,
Prothonotary, pro Tem.

113 I, J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, That Rudolph M. Schick was, at the time of signing the annexed attestation, and now is, Prothonotary pro tem. of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 19th day of May, one thousand nine hundred and twenty.

J. HAY BROWN.

I, Rudolph M. Schick, Prothonotary pro tem. of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify that the Honorable J. Hay Brown, by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 10th day of May, one thousand nine hundred and twenty.

[Seal of the Supreme Court of Pennsylvania.]

RUDOLPH M. SCHICK,
Prothonotary pro Tem.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Being informed that there is now pending before you a suit in which Director General of Railroads, United States Railroad Administration, operating the Philadelphia & Reading Railroad, is appellant, and Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, deceased, is appellee, No. 203, January Term, 1920, which suit was removed into the said Supreme Court by virtue of an appeal from the Court of Common Pleas No. 1 of Philadelphia County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,744. Supreme Court of the United States. October Term, 1920. No. 387. Gertrude M. Reed, administratrix, etc., vs. Director General of Railroads, etc. Writ of certiorari. Filed in Supreme Court Oct. 18, 1920. Philadelphia.

In the Supreme Court of the United States.

October Term, 1920.

No. 387.

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner,

vs.

DIRECTOR GENERAL OF RAILROADS, Respondent.

It is hereby agreed by and between counsel for the Petitioner and Respondent that the record now on file in the Supreme Court of the United States shall be considered as a return to the Writ of Certiorari issued out of the said Court to the Supreme Court of Pennsylvania.

and shall be the record on which this matter shall be heard on the merits by the Supreme Court of the United States.

JOHN J. McDEVITT, JR.,
Att'y pro Petitioner.
WM. CLARKE MASON,
Att'y pro Respondent.

Endorsement: In the Supreme Court of the United States.—No. 387, October Term, 1920.—Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, deceased, petitioner, vs. Director General of Railroads, respondent.—Agreement to Substitute Record.—Filed in Supreme Court Oct. 19, 1920. Philadelphia.—Frederick S. Tyler, John J. McDevitt, Jr., Attys. pro Petitioner.

Prothonotary's Office,
Supreme Court of Pennsylvania,
October 19, 1920.

STATE OF PENNSYLVANIA,
Eastern District:

In obedience to the writ of certiorari hereto attached and returned herewith, I hereby certify that the foregoing contains a true copy of the Agreement of counsel in the case therein stated, as appears from the original now of file in this office.

Witness my signature and the seal of said court hereto affixed, the day and year above written.

[Seal of the Supreme Court of Pennsylvania, 1776.]

RUDOLPH M. SCHICK,
Prothonotary pro Tem.

[Endorsed:] File No. 27,744. Supreme Court of the United States, October Term, 1920. No. 387. Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, deceased, vs. Director General of Railroads. Writ of Certiorari and Return.

[Endorsed:] File No. 27,744. Supreme Court U. S., October Term, 1920. Term No. 387. Gertrude M. Reed, adm'x. etc., petitioner, vs. Director General of Railroads et al. Writ of certiorari and return. Filed Oct. 23, 1920.

Office Supreme Court, U. S.
FILED
JUN 9 1920
JAMES D. MAHER,
CLERK.

No. [redacted]78

OCTOBER TERM, 1920.

IN THE

Supreme Court of the United States

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner,

vs.

DIRECTOR GENERAL OF RAILROADS, Respondent.

PETITION FOR WRIT OF CERTIORARI, NOTICE OF PRESENTATION AND BRIEF IN SUPPORT OF PETITION.

JOHN J. McDEVITT, JR.,
FREDERICK S. TYLER,
Counsel for Petitioner.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

INDEX.

PAGE

Notice of Presentation 1
Petition for Writ of Certiorari 5
Petitioner's Brief on Application for Writ of Certiorari 9
Statement of Facts 9
Question Involved 9
Brief Discussion of the Evidence 11
Argument on the Law 12
Assumption of Risk 17
Conclusion 24

CASES CITED.

Boldt *vs.* Pennsylvania Railroad, 245 U. S. 441 (38 Supreme Court Reporter 139) 14
Chesapeake & Ohio R. Co. *vs.* Proffitt, 241 U. S. 462, 468, 36 Sup. Ct. 620, 60 L. ed. 1102 22
Chesapeake and Ohio Railway Company *vs.* DeAtley, 241 U. S. 310; 36 Supreme Court Reporter 564–565 ..... 13, 18, 21, 22
Chicago, Rock Island and Pacific Railroad *vs.* Ward, 40 Supreme Court Reporter 276 ..... 7, 10, 16, 21, 25
Erie Railroad *vs.* Collins, 40 Supreme Court Reporter 450 16
Erie Railroad *vs.* Szary, 40 Supreme Court Reporter 454 16
Erie Railroad Company *vs.* Winfield, 37 Supreme Court Reporter 556; 244 U. S. 170 16
Erie Railway Co. *vs.* Purucker, 244 U. S. 320; 37 Sup. Ct. 629, 61 L. ed. 1166 22
Fidelity & D. Co. *vs.* Courtney, 186 U. S. 342, 251, 46 L. ed. 1193, 1198, 22 Sup. Ct. Rep. 833 18
Greenleaf *vs.* Birth, 5 Pet. 132, 135, S. L. ed. 72, 73 18
Jacobs *vs.* Southern Railway Company, 36 Supreme Court Reporter 588; 241 U. S. 229 14
Kanawha and Michigan Rwy. Co. *vs.* Kerse, 36 Supreme Court Reporter 174; 239 U. S. 576 17
New York Central Railroad *vs.* Carr, 35 Supreme Court Reporter 80; 238 U. S. 260 16
North Carolina Railroad Co. *vs.* Zachary, 34 Supreme Court Reporter 305-306; 232 U. S. 248 16
Philadelphia & Reading Railway Co. *vs.* Hancock, 40 Supreme Court Reporter 512 16
Randall *vs.* B. & O. R. R. Co., 109 U. S. 478 14
Reed *vs.* Director Gen., 267 Pa. 86 24
Reese *vs.* Philadelphia & Reading Railway Company, 36 Supreme Court Reporter 134; 239 U. S. 463 14
Seaboard Airline Railway Company *vs.* Horten, 233 U. S. 492; 34 Supreme Court Reporter 635 15
Shields *vs.* P. R. T. Co., 261 Pa. 622 13
St. Louis, San Francisco & Texas Rwy. Co. *vs.* Seale *et al.*, 33 Supreme Court Reporter 651; 229 U. S. 156 16
Tuttle *vs.* Detroit Grand Haven and Milwaukee Railway Company, 122 U. S. 189 14

In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. 387.

Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner,

vs.

Director General of Railroads, Respondent.

SIR:—Please take notice that upon the annexed petition of Gertrude M. Reed, administratrix of the estate of Leo C. Reed, deceased, a certified copy of the entire transcript of the record of this cause, including the proceedings in the Supreme Court of Pennsylvania, submitted herewith and the petitioner's brief, also to be submitted upon the presentation of the petition, an application will be made to the Supreme Court of the United States at a term of said Court, appointed to be held at the Capitol, Washington, D. C., on Monday, the fourth day of October, 1920, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania, to review the decree or judgment of the said Court granted (entered) in the above cause on the twelfth day of April, 1920, which reversed the decree or judgment of the Court

of Common Pleas No. 1 of Philadelphia County, Pennsylvania, entered in the said Court on the second day of December, 1919, in favor of the plaintiff for the sum of $15,000.

Dated at Philadelphia, this fourteenth day of September A. D., 1920.

JOHN J. McDEVITT, JR.,
811 Pennsylvania Building, Philadelphia, Pa.
FREDERICK S. TYLER,
National Metropolitan Bank Building, Washington, D. C.
Counsel for Petitioner

To William Clarke Mason, Esq., Philadelphia, Pa., attorney for Director General of Railroads, United States Railroad Administration, operating Philadelphia and Reading Railway Company.

No. 387. OCTOBER TERM, 1920.

IN THE

Supreme Court of the United States

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner,

vs.

DIRECTOR GENERAL OF RAILROADS, Respondent.

PETITION FOR A WRIT OF CERTIORARI.

JOHN J. McDEVITT, JR.,
FREDERICK S. TYLER,
Counsel for Petitioner.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. 387.

Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner,

vs.

Director General of Railroads, Respondent.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Gertrude M. Reed, administratrix of the estate of Leo C. Reed, deceased, in support of this, her petition for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania to review a decree or judgment on the twelfth day of April, A. D. 1920, which reversed a judgment of the Court of Common Pleas No. 1 of Philadelphia County, Pennsylvania, entered on the second day of December, A. D. 1919, in favor of the plaintiff below, the petitioner here, against the respondent, for $15,000, respectfully shows:—

1. That this was an action instituted at common law by the petitioner as administratrix of the estate of her deceased husband claiming damages, under the Federal Employers' Liability Act and its supplements for his death.

2. That the respondent filed an affidavit of defense alleging Government control and a general denial of negligence, upon which pleadings issue was joined, the case tried by jury and a verdict rendered in favor of your petitioner in the sum of $19,000 and by the direction of the Court a remittitur filed of all sums in excess of $15,000, whereupon judgment was entered.

3. That the record, a certified copy of which is attached hereto shows that the decedent was employed as a flagman on a regular train of the defendant, being operated between Philadelphia and South Bethlehem, Pennsylvania, which it was admitted at trial, carried interstate commerce. Upon arriving at South Bethlehem, but before the trip was finished, and the decedent's day's work (the trip) was completed, he sustained fatal injuries, while acting within the course of his employment, through the negligence of the engineer, pushing the caboose over a derail.

4 The opinion of the Supreme Court of the State of Pennsylvania held that the accident was the result of the negligence of the engineer and that the case is controlled by the Federal Employers' Liability Act, to wit: That the decedent was killed while engaged in interstate commerce, and that his death resulted from the negligence of the engineer, but concluded in effect that the decedent among the assumed risks of his employment had assumed the possibility of negligence of a fellow servant, without there having been any reason for anticipating the same.

5. The Supreme Court of the State of Pennsylvania reached this conclusion as a question of law and not of fact and without evidence to justify such conclusion under the authorities of your Honorable Court.

6. Hearing upon the said appeal was before but five of the Justices of the Supreme Court of the State of Pennsylvania, one of whom dissented.

7. That the question at law involved in this case is:—

> "Can decedent while engaged in intertate commerce be held *per se* to have assumed the risks incident to negligence of a fellow servant where the latter's negligence is admitted (in opinion) and there was no reason for decedent to have anticipated such negligence?"

8. The Supreme Court of the State of Pennsylvania held there was an assumption of risk *per se*. .To sustain this opinion would nullify fully and completely the effect of the Federal Employers' Liability Act.

9. It was the very purpose and intention of the Federal Employers' Liability Act to permit a right of action in such cases, and to do away with the fellow servant doctrine as a defense.

10. That the decision of the Supreme Court of Pennsylvania is not in accord with the decisions of your Honorable Court, but on the contrary is in direct conflict with the opinions of your Honorable Court in so holding that the decedent assumed the possibility of negligence on the part of a fellow servant.

11. The said opinion of the Supreme Court of the State of Pennsylvania is in conflict with and particularly ignores the decision of your Honorable Court in Chicago R. I. & P. Rwy. Co. *vs.* Ward, 40 Supreme Court Reporter, 276.

12. That unless your Honorable Court shall correct the errors of the Court below, your petitioner by the entr of judgment notwithstanding the verdict herein, will be deprived of property without due process of law and will be deprived of rights, privileges and immunities under the Federal Employers' Liability Act and its supplements.

Wherefore, your petitioner prays that a writ of *certiorari* may issue out of and under the seal of your Honorable Court, directed to the Supreme Court of the State of Pennsylvania commanding that Court to certify the case to this Court for review and determination, as provided in the Act of Congress, known as the "Judicial Code" or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act.

And your petitioner will ever pray, &c.

GERTRUDE M. REED,
Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner.

JOHN J. McDEVITT, JR.,
FREDERICK S. TYLER,
Counsel for Petitioner.

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

GERTRUDE M. REED, being duly sworn, says that she is the Administratrix of the Estate of Leo. C. Reed, deceased, the Petitioner named in the foregoing petition, that she has read the same and knows the contents thereof, and that the facts therein are true to the best of her knowledge, information and belief.

GERTRUDE M. REED.

Sworn to and subscribed before me this 8th day of June, A. D. 1920.

ROYAL W. URIE,
Notary Public.

[SEAL]

Commission Expires March 20, 1921.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The plaintiff's deceased husband, while employed as a brakeman by the defendant and acting in the course of his employment in interstate commerce, was killed as a result of the negligence of his engineer.

This suit was instituted for the benefit of the widow and child under the Federal Employers' Liability Act and its supplements, at trial there was no defense and a jury in the Common Pleas Court rendered a verdict in favor of the plaintiff for $19,000, which amount was reduced under order of the Court, by the filing of a remittitur of all sums over $15,000, and judgment entered thereon. Thereupon, the defendant appealed to the Supreme Court of the State of Pennsylvania, which Court reversed the judgment of the Court below entering judgment for the defendant *non obstante veredicto*, on the theory that the negligence of the engineer was an assumed risk of the employment, and as such barred a recovery. The appeal was heard by but five of the seven justices, one of whom dissented.

QUESTION INVOLVED.

To what extent can the decedent be held to have assumed the risk of a negligent act of a fellow servant which caused his death, where there was neither notice nor reason for him to have anticipated such act?

Briefly, is the negligence of a fellow servant under such circumstances a risk assumed incidental to such employment?

The decision of the Supreme Court of Pennsylvania eliminates all other questions and restricts the issue to this narrow proposition at the same time finding and basing its decision on the theory that the decedent was engaged in interstate commerce; that the negligence was the negligence of the engineer and that the decedent was not negligent (Record, pages 84-85).

These questions had already been resolved in favor of the plaintiff by the jury and Common Pleas Court; they were purely issues of fact. The Supreme Court in so finding used this language (Record, page 84):—

> "Plaintiff, as administratrix of her deceased husband's estate, brought an action of trespass, averring he was negligently killed while working for defendant in interstate commerce. A verdict and judgment having been entered for plaintiff, defendant appeals, *inter alia*, because its point for binding instructions was refused and its motion for judgment *non obstante veredicto* dismissed. Complaint is made that these decisions are erroneous for several reasons, but we will consider only one thereof, viz: did decedent's death result from a risk which he assumed as the result of his employment? If it did plaintiff cannot recover.
>
> "Taking the evidence in the light most favorable to plaintiff, as of course we must do, we find the facts to be as follows: Decedent was a member of a crew which had brought a train from Philadelphia to South Bethlehem. Some of the cars contained goods shipped in interstate commerce." * * *
>
> "In considering the present question we also assume the negligence was that of the engineer and not of decedent" (Record, page 85).

There was not a word of evidence to indicate negligence on the part of the decedent in fact no defense was offered, but on the contrary, the negligence was inexcusable and exclusively that of the engineer.

The error of the learned Court below from which we are appealing is so clear and obvious that it is perhaps superflous to refer to any other decision than that of your Honorable Court in **Chicago, Rock Island and Pacific Railroad vs. Ward,** 40 Supreme Court Reporter, 276. That decision of itself justifies a reversal of the judgment of the Court below and, of course, the allowance of this *certiorari*.

BRIEF DISCUSSION OF THE EVIDENCE.

The decedent was engaged as a member of a crew hauling interstate commerce between Philadelphia, Pennsylvania, and South Bethlehem, Pennsylvania. The defendant admitted that the train contained interstate commerce (Record, page 27), and the Supreme Court of Pennsylvania held in its opinion that the decedent was engaged in Interstate Commerce at the time of his injury (Record, page 84), and its decision is based on that theory. That question is, therefore, eliminated from the case, and the fact that the accident occurred in a yard has no bearing whatever on the issue nor does the fact that the derail was involved, since the derail was harmless in itself and the proximate cause of the injury as admitted by the Court below was not the derail, but the failure of the engineer to respect the warnings and signals, to wit, his negligence.

The decedent's "run" was incomplete. In fact the "run" was incomplete until the caboose had been put away and the engine placed in the roundhouse (Record, page 39). In other words, the decedent's employment, as well as other members of the crew of this particular train, had been continuous from the time they left Philadelphia, and was incomplete at the time of the accident; it was a fixed run, and in no sense a shifting operation (Record, page 39).

There can be no question as to the negligence of the engineer. In the record it is undenied. It appears that the engine started to push the caboose, several hundred feet from the point of the accident, for the purpose of reaching the caboose storage track. It was necessary for one of the crew to occupy the position assumed by the decedent (Record, page 41), and the Court below found that the decedent was acting in the course of his employment (Record, page 85).

Previous to the movement the conductor warned the engineer, of the presence of the derail (Record, page 40), and in addition to this as the caboose approached the derail the decedent not only gave a signal to stop, but he yelled "Whoa, whoa" (Record, page 30). The conductor

who was riding on the tender also called to the engineer to stop (Record, page 45), when the engine was two car lengths from the derail, thus giving him about six times the space necessary to make a stop, since it was testified that the engine was only traveling at the rate of five miles per hour, and that it could be stopped under those conditions within 10 feet (Record, page 59). He also made clear that decedent's signal was a stop signal (Record, page 41).

Admittedly it was impossible for the decedent to have jumped from the caboose on account of the presence of cars on the adjoining track (Record, page 43), and it was the collision with those cars that caused his death.

The derail was located approximately 36 feet from the main track (Record, page 44), and at the time a passenger train was standing on the main track. Consequently, had the caboose not been derailed it would have struck the passenger train (Record, page 62).

As a matter of fact, although it was testified that the engine could have been stopped within 10 feet, it traveled several times that distance over the derail and until the caboose, engine and part of tender were off the track before brought to a stop (Record, page 53). Showing conclusively that the engineer failed to exercise caution and obey the signals of decedent and conductor to stop.

The only feeble effort made at a defense was the vague suggestion that the decedent might have crossed the platform from the right side of caboose where his duties required him to be, to the left side and jumped. This, of course, involved a question of fact which was fully argued to the jury.

ARGUMENT ON THE LAW.

It was of course idle to contend that the decedent might have crossed to the other side of the platform and jumped for two reasons:—

First.—He was justified in assuming the engineer would use due care and stop before striking the derail.

Secondly.—He knew the engineer had been warned of the derail (Record, page 40), and he was therefore justified in assuming that he would heed the notice and signal, and there was nothing to warn him to the contrary until the collision, and it is apparent that until that moment (collision) the decedent assumed the caboose would stop.

As a general principle of law one is justified in assuming that another will exercise due care. Chesapeake and Ohio Railway Company *vs.* DeAtley, 241 U. S. 310; 36 Supreme Court Reporter, 564-565; Shields *vs.* P. R. T. Co., 261 Pa. 622.

Since, however, the jury and the Supreme Court have both found that the negligence was the negligence of the engineer, it is unnecessary to pursue this argument any further.

In passing, however, we would note that the jury by its verdict and both of the Courts below found that the decedent was engaged in interstate commerce, and it was decided on that theory. They also found that the negligence responsible for his death was the negligence of the engineer, and therefore, the fact that the accident took place in a yard is unimportant, and has no bearing whatever on this issue, since the negligence was the negligence of the engineer, resulting in the death of the decedent while both were engaged in interstate commerce. This also answers the Court's reference to various cases where accidents occurred in railroad yards. Those cases would be applicable if the negligence in this instance was negligent construction or negligence due exclusively to the fact that the accident took place in the yard. As a matter of fact, the derail was a mere incident. The proximate cause of the decedent's death was negligence of the engineer. Hence, whether it was due to collision with another train resulting from a "derail" or other cause is immaterial, and the fallacy of this contention of the Court below is obvious.

We shall briefly refer to the several cases cited by the

Court upon which it based its conclusion that the negligence in this case was an assumed risk of the employment. On both facts and principles they are distinguishable from the case at bar which is ruled by the cases discussed thereafter. There was absolutely not a word of evidence that would justify the conclusion that there had been an assumption of risk in this case. The cases so relied upon by the Court below were:—

Jacobs vs. Southern Railway Company, 36 Supreme Court Reporter 588; 241 U. S. 229, in which the plaintiff was held to have assumed the risk incident to a pile of cinders which had been customarily placed in the same position for many years, it was clearly within his vision and known when he undertook to board an engine holding a vessel of water in his hands. The objection was to the charge on a second trial, which resulted in a verdict for the defendant. The case recognizes the general principles of law for which we contend, however such facts can have no bearing upon the decision of our case.

Reese vs. Philadelphia & Reading Railway Company, 36 Supreme Court Reporter 134; 239 U. S. 463, simply decides that there was no evidence of negligence and that a railroad yard necessarily has a great number of tracks, and switches close to one another, citing as an authority **Randall vs. B. & O. R. R Co.** 109 U. S. 478, neither of which cases can have any bearing on this issue.

Tuttle vs. Detroit Grand Haven and Milwaukee Railway Company, 122 U. S. 189, has no bearing whatever on the present issue, having been decided before the Federal Act and simply involved the question of negligence in the permanent construction of tracks.

Boldt vs. Pennsylvania Railroad, 245 U. S. 441 (38 Supreme Court Reporter 139), has no bearing on this case, being an appeal from a judgment on a verdict for the defendant. At the same time the rule is quoted that "at common-law a servant assumes extraordinary risks incident to his employment or risks caused *by the master's negligence which are obvious or fully known and appre-*

ciated by him." In our case it was unknown and unanticipated.

It is clear that the learned Court below misconceived the effect of the aforementioned decisions, and in no sense can they control the present issue since they are either cases where there were jury verdicts for defendants or where there were open, obvious and known dangers and neither class of cases can control ours.

Another case cited by the Court on this point, **Seaboard Airline Railway Company vs. Horten,** 233 U. S. 492; 34 Supreme Court Reporter 635, can on its facts have no bearing on this case favorable to the defendant, but the decision makes clear and sustains our position that notice and appreciation of risk are essential before they can bar a recovery.

The other cases cited by the Court below in reality recognize the law applicable to this case, to wit, that an employee does not assume risks incident to unusual or extraordinary dangers. Hence, both under the theory that one may assume another will exercise due care as well as the decisions of your Court hereinafter referred to, the negligence of the engineer, since it was not to have been anticipated, belongs within the class of extraordinary risks which are not assumed, as admitted by the opinion of the Court below.

In passing we want to make clear that since the jury found as a fact and the Court below holds that the decedent was engaged in interstate commerce the fact that the accident occurred in the yard is immaterial, since the case does not belong to that class of cases where there was a known danger, the risk of which had been assumed. Even under the decision of the Court below this was not contended. There was no notice nor reason to have anticipated the negligence of the engineer. Therefore the cases of yard operation referred to by the Court below under its opinion did not affect the interstate character of decedent's employment. That he was employed in interstate commerce, although so admitted, is unquestionable and is thoroughly established by numerous decisions of your Honorable Court, including:—

St. Louis, San Francisco & Texas Rwy. Co. vs. Seale et al., 33 Supreme Court Reporter 651; 229 U. S. 156;

North Carolina Railroad Co. vs. Zachary, 34 Supreme Court Reporter 305-306; 232 U. S. 248;

Erie Railroad Company vs. Winfield, 37 Supreme Court Reporter 556; 244 U. S. 170;

Chicago, Rock Island & Pacific Railroad vs. Ward, 40 Supreme Court Reporter 276;

Philadelphia & Reading Railway Co. vs. Hancock, 40 Supreme Court Reporter 512.

The fact that the train ran entirely within the State does not, under the circumstances, deprive the decedent of the benefits of the Federal Act. **New York Central Railroad vs. Carr,** 35 Supreme Court Reporter 80, 238 U. S. 260, and **Philadelphia & Reading Railway Co. vs. Hancock,** 40 Supreme Court Reporter 512.

Whether a railroad employee is engaged in interstate commerce depends upon whether the work being done is so closly related to interstate commerce as to be practically a part of it.

Erie Railroad vs. Collins, 40 Supreme Court Reporter 450;

Erie Railroad vs. Szary, 40 Supreme Court Reporter 454.

The decedent had one fixed duty, which constituted a day's work and the run was incomplete at the time of the accident (Record, page 39). This was in no sense a "shifting operation," but, we repeat, it was part of a continuous incompleted run. The Court below for the purposes of its decision very properly admits that the decedent was engaged in interstate commerce, and narrowed the issue to the one question (Record, page 84):—

> "Did decedent's death result from a risk which he assumed as the result of his employment? If it did, plaintiff cannot recover."

The Court then concluded that the negligence resulting in decedent's death was the negligence of the engineer, and although there was no notice or reason for him to have anticipated such negligence, that it was nevertheless an assumed risk of the employment. This whole question is thus brought within that narrow issue, which is obviously wrong.

Assumption of Risk.

Your Honorable Court in several recent cases has clearly defined the doctrine of assumption of risk, its application and the relative duties of Court and jury with respect thereto, and we shall briefly refer to those authorities which control this case and were ignored in the opinion of the Court below.

In **Kanawha and Michigan Rwy. Co. vs. Kerse,** 36 Supreme Court Reporter 174, 239 U. S. 576, your Honorable Court in an oopinion by Mr. Justice Pitney sustained a verdict for the plaintiff where the facts were much more favorable to the defendant than in the case at bar. Commencing at page 175, the following language was used in your opinion:—

> "The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses, and free from contradiction, the trial Court could not be charged with error in refusing to take the question from the jury.
>
> "Only one matter remains to be mentioned. The Court refused to instruct the jury, as requested by defendant, 'that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on top of a box car, and with such knowledge continued in the service of the Kanawha and Michigan Railway Company, where his duties required him to pass under said piece of timber, then said Thomas P.

Barry must be held to have assumed the risk of being injured by being struck by said piece of timber and there can be no recovery by the plaintiff herein.'

"Since knowledge of a fixed obstruction over the track in such a position as not to clear a man standing upon the top of a box car would seem necessarily to import to an experienced brakeman that there was a risk of injury to him in that situation, and since there was no evidence of objection by Barry or promise of reparation by his employer to rebut the presumption that the risk was assumed, the refusal of this request appears plainly erroneous. But this does not result in a reversal of the judgment under review, because by specific findings of fact the jury negatived the hypothesis upon which alone the instruction was based. In response to particular interrogatories submitted by the Court, they found that Barry did not know that the piece of timber was stretched over the track, and (of course) did not know that the timber was so low that it would not clear him standing upon the top of the box car.

"A judgment is not to be reversed for an error by which the plaintiff in error cannot have been prejudiced. And the refusal of an instruction as to the legal result that would follow only upon the hypothesis that the deceased knew of the presence of the timber, and knew it would not clear a man standing upon the top of a box car, became legally insignificant when the jury had in its findings distinctly negatived the facts that made up the hypothesis. Thus the progress of the trial rendered the error wholly immaterial to the merits. Greenleaf *vs.* Birth, 5 Pet. 132, 135, S. L. ed. 72, 73; Fidelity & D. Co. *vs.* Courtney, 186 U. S. 342, 251, 46 L. ed. 1193, 1198, 22 Sup. Ct. Rep. 833.

"Judgment affirmed."

In **Chesapeake & Ohio Railway Company vs. De Atley,** 36 Supreme Court Reporter, 564, the head brake-

man of a freight train, though assuming the risk normally incident to the boarding of a moving train in the discharge of his duties, your Honorable Court held, does not assume the risk of injury involved in an attempt to board a train operated at an unusually high and dangerous rate of speed until made aware of the danger, unless the speed and consequent danger were so obvious that an ordinary careful person in his situation would have observed the one and appreciated the other.

It is for the jury to say whether the head brakeman on a freight train assumed the risk of injury in an attempt in the discharge of his duties to board the engine of his train, which was moving directly toward him at a speed of twelve miles per hour.

There is no error in refusing to give a requested instruction upon the question of the assumption of risk which deals solely with the ordinary risks and hazards, and embodies no definition of such risks and hazards, nor any qualifications appropriate to the particular facts of the case, which involves a question of extraordinary hazard.

> "We are unable to concur in the view that there was no question for the jury. Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive and appreciated the extraordinary danger; or, if not, then upon whether the undue speed and the consequent danger to him were so obvious that an ordinarily prudent person in his situation would have realized and appreciated them. The Court of Appeals reasoned that plaintiff's duties required him to be upon the passing

REED, ADMINISTRATRIX OF REED, *v.* DIRECTOR GENERAL OF RAILROADS, UNITED STATES RAILROAD ADMINISTRATION, OPERATING PHILADELPHIA & READING RAILROAD.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 78. Argued January 13, 1922.—Decided February 27, 1922.

In actions under the Federal Employers' Liability Act, the doctrine of assumption of risk has no application when the negligence of a fellow servant which the injured party could not have foreseen is the sole, direct and immediate cause of the injury. P. 95.

267 Pa. St. 86, reversed.

CERTIORARI to a judgment of the Supreme Court of Pennsylvania, reversing a judgment for the plaintiff, the present petitioner, in an action under the Federal Employers' Liability Act, and directing entry of judgment for the respondent, *non obstante veredicto.*

Mr. John J. McDevitt, Jr., with whom *Mr. Frederick S. Tyler* was on the brief, for petitioner.

Mr. Wm. Clarke Mason for respondent.

The case is determined by *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492, and *Boldt* v. *Pennsylvania R. R.*

Co., 245 U. S. 441. These are not in conflict with *Chicago, Rock Island & Pacific Ry. Co.* v. *Ward*, 252 U. S. 18, where the movement of the train on which the brakeman was riding involved no danger of collision with a known obstacle upon the track, and no hazard would have resulted from his position if the train had been permitted to continue on its way according to the usual method of operation.

In the present case, there was within the vision of Reed a fixed obstacle on the track, bound to cause derailment unless coöperation between him and the engineer could stop the car. Its presence was known to him and was one of the hazards of "a dangerous yard movement" which he assumed. The case is like *Boldt* v. *Pennsylvania R. R. Co.*, *supra*. See also *Baugham* v. *New York, Philadelphia & Norfolk R. R. Co.*, 241 U. S. 237; *Southern Pacific Co.* v. *Berkshire*, 254 U. S. 415; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 663.

Mr. Justice McReynolds delivered the opinion of the court.

The petitioner brought an action in the Court of Common Pleas at Philadelphia, alleged that her husband was negligently killed while employed in interstate commerce by the Philadelphia & Reading Railroad and demanded damages. She claimed under the Federal Employers' Liability Act. Verdict and judgment having been entered for her, an appeal was taken to the Supreme Court of the State, and reversal sought upon several grounds. That court considered only one question—Did decedent's death result from a risk which he assumed as the result of his employment? And, concluding that he had assumed such risk, it reversed the judgment of the trial court and entered one for respondent *non obstante veredicto*. 267 Pa. St. 86. As found and stated by the Supreme Court the facts are these:

"Decedent was a member of a crew which had brought a train from Philadelphia to South Bethlehem. Some of the cars contained goods shipped in interstate commerce. When all the cars were released at their appropriate places, the engine went back to get the caboose for the purpose of taking it to the point where it was to stay until wanted for further traffic, and then itself go to the roundhouse where it was to remain until again needed. This movement was through defendant's yard, where there were a number of tracks upon which cars and locomotives were being shifted constantly. Through the yard ran also the main passenger tracks of defendant, and, at the points where other tracks crossed over or connected therewith, derailing devices had been wisely installed for the purpose of preventing locomotives and cars using the other tracks from running on to or over the passenger tracks, at a time when passenger trains were standing or traveling thereon, and thereby possibly causing collision and serious loss of life.

"The engine and caboose which had reached South Bethlehem were moving over a track which had one of those derailing devices where it connected with the passenger tracks. The caboose being in front of the locomotive, the engineer could not see the device when operating the engine from his cab and hence decedent was directed to and did locate himself on the front of the caboose, with a duty to signal the engineer in time for him to safely stop if the derailing device was set against further passage. It was so set on this occasion, but either through the negligence of decedent himself, or of the engineer in failing to notice or heed the signalling of decedent, the locomotive did not stop in time, the caboose was derailed and decedent was crushed to death between it and cars on an adjoining track."

Accepting the view that the engineer's negligence was the proximate cause of the fatal injury, the court below

held the decedent had assumed the risk of such negligence and the master was not liable, citing among other cases *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492. This we think was error.

Seaboard Air Line Ry. v. *Horton*—often followed—ruled that the Federal Employers' Liability Act did not wholly abolish the defense of assumption of risk as recognized and applied at common law. But the opinion distinctly states that the first section "has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employé of the plaintiff." The *Second Employers' Liability Cases*, 223 U. S. 1, 49, declared that "the rule that the negligence of one employé resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employé." And in *Chicago, Rock Island & Pacific Ry. Co.* v. *Ward*, 252 U. S. 18, we said: "The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk." See *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260; *Chesapeake & Ohio Ry. Co.* v. *DeAtley*, 241 U. S. 310, 313.

In actions under the Federal Act the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant which the injured party could not have foreseen or expected is the sole, direct and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad while engaging in interstate commerce shall be liable to the personal representative of any employee killed while employed therein when death results from the negligence of any of the officers, agents or employees of such carriers.

For the reasons indicated, the judgment of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.